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THE JUDICIAL NOMINATION AND CONFIRMATION PROCESS

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BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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STATEMENTS OF COMMITTEE MEMBERS

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JUDICIAL NOMINATIONS 2001: SHOULD IDEOLOGY MATTER?

TUESDAY, JUNE 26, 2001

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:06 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Charles E. Schumer, Chairman of the Subcommittee, presiding.

Present: Senators Schumer, Feingold, Durbin, Sessions, Hatch, Kyl, Brownback, and McConnell.

OPENING STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Chairman SCHUMER. Good morning, everybody. The Subcommittee will come to order.

I will make an opening statement, so will Senator Sessions and any other member who wishes to, and then we will go right into our panel.

Today, for the first time in over a decade and for the first time during the Bush presidency, we are formally examining the judicial nominations process. This hearing is specifically focused on the vital question of what role ideology should play in the selection and confirmation of judges. Let me start by saying that it is our intention to hold a series of further hearings that will examine in detail several other important issues related to the judicial nominating process.

At this point, we plan to hold at least three more hearings on the following issues: one, the proper role of the Senate in the judicial confirmation process. What does the Constitution mean by "advise and consent," and historically how assertive has the Senate's role been?

Two, what affirmative burdens should nominees bear in the confirmation process to qualify themselves for lifetime judicial appointments? The Senate process can be criticized for being a search for disqualifications. We will examine whether the burden should be shifted to the nominees to explain their qualifications and views to justify why they would be valuable additions to the bench.

And, three, the significance of the Supreme Court's recent federalism decisions for the judicial selection process. Most Americans probably do not realize what these cases curtailing the powers of Congress mean for their everyday lives and futures. We will try to

make these somewhat esoteric and often abstract decisions more real and more relevant for ordinary citizens.

Today's hearing on ideology is a good place to start because it will touch upon all of these issues and serve as the beginning of the important dialog that we in the Senate should be having before we proceed much further with nomination hearings, and certainly before we embark on the consideration of Supreme Court nominees.

First, I have read all the testimony submitted by our eight witnesses and I have to say it is just excellent. I would commend to every one of my colleagues who sit on this Subcommittee or not to read them. There is a diversity of opinion. It is all cross-cutting. It is not that all Democrats or liberals are on one side and all conservatives or Republicans on the other. Both sides of this issue, if it can be called two-sided, present alluring arguments and certainly underscore how difficult and how important the issue we are wrestling with today is.

One thing is clear to me. The ideology of particular nominees often plays a significant role in the confirmation process. Unfortunately, knowing when and to what degree ideology should be a factor for the Senate is far more obscure.

For whatever reason, possibly senatorial fears of being labeled partisan, legitimate considerations of ideological beliefs seem to have been driven underground. It is not that we don't consider ideology; it is just that we don't talk about it openly.

Unfortunately, this unwillingness to openly examine ideology has sometimes led Senators who oppose a nominee to seek out non-ideological disqualifying factors, like small financial improprieties from long ago, to justify their opposition. This, in turn, has led to an escalating war of "gotcha" politics that, in my judgment, has warped the Senate's confirmation process and harmed the Senate's reputation.

As many of you know, this was not always the Senate's practice. During the first 100 years of the Republic, one out of every four nominees to the Supreme Court was rejected by the Senate, many for clear ideological reasons. George Washington's appointment of John Rutledge to be Chief Justice and President Polk's nomination of George Woodward are two early examples of Senate rejection of nominees on purely ideological grounds.

The power of the Senate in the nominations process, however, has been accordion-like, and from 1895 to 1967 only one Supreme Court nominee was defeated. Since 1968, ideological considerations have occasionally surfaced, most notably in the Republican opposition to the Fortas nomination to be Chief Justice and in Democratic opposition to the nomination of Robert Bork. But since the Bork fight in 1987, ideology, while still an important factor for the Senate, has primarily been considered sub rosa, fostering a search for a nominee's disqualifiers that are more personal and less substantive.

It is high time we returned to a more open and rational consideration of ideology when we view nominees. Let's make our confirmation process more honest, more clear, and hopefully more legitimate in the eyes of the American people, and let's be fair to the nominees the President selects.

If we do this, the knotty question we face is how dominant factor should a nominee's ideology be in the Senate's consideration. Historically, the role ideology played in past confirmations has varied, but it seems to me that several factors are relevant: first, the extent to which the President himself makes his initial selections on the basis of a particular ideology; second, the composition of the courts at the time of the nomination; and, third, the political climate of the day.

The Eisenhower presidency is instructive and shows how these factors affect the Senate's confirmation process. First, Eisenhower's selection criteria were non-ideological. He brought the ABA into his selection process and sought candidates with, as he put it, "solid common sense," eschewing candidates with extreme legal or philosophical views.

Second, the balance of the courts was leftward in light of 20 years of Democratic appointments. In fact, when Eisenhower took office, 4 out of every 5 Federal judges were Democrats.

Third, politically Eisenhower had a strong mandate, having been elected overwhelmingly by majorities in both 1952 and 1956.

Thus, in a time when the courts had been filled with Democrats, a split Senate had little cause to ideologically oppose the non-political picks of an overwhelmingly popular Republican President.

Today, the calculus is much different. President Bush campaigned on a pledge to appoint judges of a particular stripe, like Justices Scalia and Thomas. And the balance of the courts, especially the Supreme Court, leans to the right.

Politically, the American people were divided in our recent national elections, sending a message of moderation and bipartisanship. This era, perhaps more than any other before, calls out for collaboration between the President and the Senate in judicial appointments. The "advise" in "advise and consent" should play a new and more prominent role. It also certainly justifies Senate opposition to judicial nominees whose views fall outside the mainstream and have been selected in an attempt to further tilt the courts in an ideological direction.

Having one or even two Justices like Scalia and Thomas might be legitimate because it provides the Court with a particular view of constitutional jurisprudence. But having four or five or nine Justices like them would skew the Court, veering it far from the core values most Americans believe in.

The Constitution instructs the Senate to first advise the President as to his choice of nominees and then to review and decide whether to confirm the President's picks. As the research of some of the witnesses we will hear today, Professors Tribe and Sunstein, has forcefully revealed, the debates of the Constitutional Convention suggest a fully shared authority between the President and the Senate as to the composition of the Supreme Court.

Let me conclude by saying that I and many of my colleagues see the appointment of judges as the ultimate test of bipartisanship. In electing two branches of our Government, the country was split down the middle, leaving appointments to the third branch as perhaps the defining indicator of the political direction the country will take.

The President, of course, can choose to exercise his nomination power however he sees fit. But if the President sends countless nominees who are of particular ideological caste, Democrats will likely exercise their constitutionally given power to deny confirmation so that such nominees do not reorient the direction of the Federal judiciary. But if the President does not grossly inject ideological politics into his selection criteria, neither will, nor should, the Senate.

Today, we are going to hear from two former White House Counsels who spent years advising and recommending candidates for the Federal bench in both Republican and Democratic administrations. We will hear also from some of the brightest legal academics around who have dedicated their careers to studying judicial nominations and the way the Senate and President handle them.

The issue we are discussing is not merely academic. As yesterday's decision showed, there are many 5–4 splits on the Court right now on fundamental issues of the day, including most importantly the extent of power held by the Court's coequal and democratically elected branches of Government.

We therefore begin this important inquiry. There will be a range of discussion and opinion. As I say, when you read the different testimonies, each view is alluring. I have laid out mine because I believe we should bring everything above the table, and I am starting right now by saying where I come from, although I am open to be persuaded that I might be wrong.

Let me thank in advance our distinguished witnesses. WE are very interested in hearing your testimony and engaging you on these issues.

I also want to thank my colleague, Senator Sessions. I am going to turn to him for his opening statement, but first I want to thank him up front for making this a fully bipartisan hearing, with equal numbers of witnesses chosen by each side. He and his staff are a pleasure to work with, and I look forward to holding future hearings in the same bipartisan manner.

Senator Sessions?

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman. I do appreciate the opportunity to be here, and thank you for working with us to coordinate this hearing. I think you and your staff have been most gracious. We have an equal number of witnesses. You couldn't be fairer about that, and I hope that we can make some progress as we discuss these issues.

Frankly, I hadn't heard that kind of talk about evaluating the judges so aggressively in the last 6 years. We do have an evenly divided Senate, but remember just a few years ago there were 55 Republicans and Clinton judges were moved forward on a steady pace. There were 377 confirmed and only one voted down. There were only 41 Clinton nominees left pending when he left office, and unconfirmed, I think a record far superior to that of when President Bush left office and he had a Democratic Senate.

So I think there is a myth out there that somehow Clinton judges were mistreated. And building on that myth is an idea that now

is the time for either a new standard or an open, aggressive assault on Bush judges. I think that would be a mistake.

The constitutional process of confirming judicial nominees is one of our important duties in the Senate. I take it seriously. It is part of the advice and consent process. Article II, section 2, clause 2 of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint...Judges of the supreme Court, and all other Officers of the United States..." The President decides who to nominate and the Senate renders advice and decides who to confirm.

Using those basic ground rules, Presidents and Senates have worked together for over 200 years to appoint a sufficient number of Federal judges to try the people's cases in Federal courts. President Reagan, with 6 years of a Senate of his own party, appointed a record 382 judges. President Clinton, with 6 years of a Senate of a party not his own, appointed the second greatest number, 377.

While the President has traditionally been accorded great deference in selecting his nominees, the Senate is not a rubber stamp. Indeed, we have a duty to assess at least a nominee's integrity, qualifications, temperament, ability, and other factors that are important.

Throughout my tenure in the Senate, I have been impressed with the manner in which the former Chairman of this committee, Senator Hatch, guided the judicial assessment process. He elevated the committee's judicial nominations hearings above partisan and personal attacks. He examined each nominee's integrity, qualifications, temperament, and approach to the law.

While Senators sometimes disagreed on these issues, Senator Hatch is to be commended for not calling a series of nominations hearings at which panels of witnesses were called to attack Clinton nominees. If there was a personal issue, he handled it privately, thus saving the nominee and nominee's family much anguish. His fairness and gentlemanly demeanor were a credit to the Chair he held on this Committee and to the Senate as a whole.

Certainly, treating nominees fairly was a goal of mine when I came to the Senate. I felt like the Senate could do a better job of being fair to nominees and respectful of nominees. If we disagreed with them, we inquired into the problems that we had a disagreement with or a concern, but it was not necessary to attack someone's integrity and character if you disagreed with them or questioned a ruling or a position or a writing they have taken in the past.

So, today, we address the question of "should ideology matter" in the exercise of the Senate's advice and consent responsibilities. I am not sure what "ideology" means, but to answer this question I must first distinguish judicial philosophy, which describes a nominee's approach to the law, from result-oriented political ideology which describes a nominee's view of how he or she would like to win the case.

In my view, the Senate may appropriately examine a nominee's judicial philosophy, and should do so, but should not assess a nominee on some results-oriented ideological or political basis to demand that they produce rulings that we might politically agree with.

Does the nominee understand that his or her role as a judge is to follow the law, regardless of personal political opinion? Does he or she understand the role of precedent in interpreting the law? Can the nominee put aside political views, which may be appropriate as a legislator, executive or advocate, and interpret the law as it is written? Will the nominee keep his or her oath to uphold the Constitution, first and foremost? The Senate needs to know the answers to these important questions. Questions that would implicate a nominee's view on what the result of a particular case should be, however, should not be asked, in my view.

This is important primarily because Federal judges are unelected. They are appointed and confirmed once, normally in a fairly routine manner, and then serve for life, unaccountable to the normal political process or to the people. Policy decisions, therefore, if we are to maintain our democracy, must be left in the hands of the political branch, those who are accountable to the people. Democracy is undermined in a most fundamental way if we assert that judges have the power to set public policy, because they are unaccountable to the American people. So this is a deep, fundamental question of great importance, it seems to me.

The ultimate responsibility for legal results does not lie with the judge under our system, but with the people who elected their legislators. In our democracy, that is where the responsibility for making rules is supposed to lie, for this allows the people, if they are unsatisfied with the rules, to change them through the democratic process of electing new Federal and State legislators and through ratifying amendments to the Constitution.

I have heard some talk about the need for moderate judges. Again, it is important to distinguish moderation in terms of deferring to policies embodied in the law from moderation seeking politically palatable results.

On the one hand, Alexander Hamilton applauded the "benefits of integrity and moderation of the judiciary," whether the results of decisions were "disappoint[ing]" or the cause of "applause." On the other hand, he categorically rejected moderation in a judge's duty to follow the law, concluding that "inflexible and uniform adherence to the rights of the Constitution, and of individuals [is] indispensable in the courts of justice. . ."

For example, in *Brown* v. *Board of Education*, the Supreme Court properly ruled that "separate but equal" public schools for the races violated the Equal Protection Clause of the 14th Amendment. The States were denying African-American students equal protection through the State education laws.

The Court's ruling, however, did not evoke a moderate public response. Who knows what the polling data would have shown about that ruling? But in many instances, a hue and cry came from some of those who opposed the result. While this result may not have been moderate in a political poll sense, it was the proper course of legal action.

In the exercise of its advice and consent responsibilities, the Senate's duty does not lie with public opinion polls, professors' theories, or interest groups. Instead, as Senators, we solemnly swear to "support and defend the Constitution of the United States. . .so

help [us] God." We should ensure to the best of our ability that judges do the same.

Some may ask why judicial philosophy matters. Judicial philosophy matters because it determines whether results in real cases are consistent or not, whether you can count on the rules being followed every time.

How many of you would want your right to free speech enforced only some of the time? How many would want your right to be free from unreasonable searches enforced only when a judge felt it would be politically popular to do so? How many would want your right not to be discriminated against by State schools based on your race enforced only if a judge liked you?

In America, we want our rights protected every time. This is the only way we can be sure that our contracts will be enforced in our business dealings, that our neighborhoods will not be overrun with crime, and that our government officials will not abuse their power for their own advantage.

The Founding Fathers believed that the best way to ensure that the laws are followed every time is to write the laws down and to have government officials who will follow them. We call this the rule of law. If the laws were unwritten, then judges and officials could make them up as they go. Our rights would depend on the whim of unelected judges.

If the laws are written down, however, every judge and government official starts on the same page. This makes it more likely they will be consistent in their application of the laws to all the cases before them. Our rights depend on written laws in America. The people control what the laws say, and we must expect judges will enforce the laws as written. It is so basic.

Activism was Senator Hatch's standard for whether or not a judge at the basic level should be confirmed. He defined that as a judge who was unwilling to follow the law. He wanted to know would a judge subject himself to the law. We confirmed overwhelmingly pro-choice judges. We confirmed many judges who opposed the death penalty. They were asked, will you enforce the law even if you do not agree with it? If they didn't say that they would, they would not have been confirmed. They said that they would and they were confirmed overwhelmingly. Only one judge was voted down in this last session. So activism is a standard that Senator Hatch set forth that is defensible. I am concerned about a word as vague as "ideology." I am not sure what that would mean.

I will just conclude and put the rest of my remarks in the record.

Chairman SCHUMER. Without objection.

Senator SESSIONS. The President and the Senate should work together. I believe, Mr. Chairman, that you will ask tough questions, and you have every right to. I believe that judges should be inquired of, but if they will follow the law, if they are men and women of good integrity, if they are men and women of proven accomplishment, if they have good judgment and can do the job in every respect, and have a proven record to that effect, I believe the President's nominees should be given great deference.

I would be very concerned if we were to create a historical change here. After President Clinton's judges were given so much deference, really, and he was given so much support for those he

nominated, it would be an unwise and dangerous thing for this Senate to now change the way we evaluate judges and begin to undermine the confidence that the American people have in law.

My longtime concern about law in America has come about because some people seem to think that it is unascertainable, that judges can redefine words in ways that make them say anything they would like for them to say. This is a very dangerous and corroding philosophy.

The American people believe words have meaning. They believe statutes bind judges and politicians and citizens. They believe they can be given meaning. We have afoot in America today a philosophy often in our law schools that suggests that words don't have objective meaning, that it is all politics, it is all power, and that truth is not ascertainable and law can't be consistently applied.

I hope we don't nurture that in the way we approach the judicial nomination process. We need to call on people to follow the law, and I believe that they can, and I believe that when we do so the great protections and prosperity this Nation has enjoyed will continue.

Thank you, Mr. Chairman.

[The prepared statement of Senator Sessions follows:]

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Mr. Chairman, I would like to thank you and your staff for working with me and my staff in coordinating this hearing. You have been very gracious in allowing us to have an equal number of witnesses. We have been able to put the nation's interest first in the past, and I look forward to working with you on this Subcommittee and on full Committee to do the same in the future.

The constitutional process of confirming federal judicial nominees is one of the Senate's most important duties. I take it very seriously. It involves a Senator's view of the advice and consent process, his or her respect for the rule of law, and his or her views on judicial activism.

ADVICE AND CONSENT

Article II, Section 2, Clause 2 of the Constitution, provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States . . . ." The President decides who to nominate and the Senate renders advice and decides who to confirm.

Using these basic ground rules, Presidents and Senates have worked together for over 200 years to appoint a sufficient number of federal judges to try the people's cases in federal courts. President Reagan, with six years of a Senate of his own party, appointed a record 382 Article III judges. President Clinton, with six years of a Senate of a party not his own, appointed the second greatest number of judges—377. I voted one down.

While the President has traditionally been accorded great deference in selecting his nominees, the Senate is not a rubber stamp. Indeed, we have the duty to assess, at least, a nominee's integrity, qualifications, and temperament.

Throughout my tenure in the Senate, I have been impressed with the manner in which the former Chairman of the Judiciary Committee, Senator Hatch, guided this assessment process. He elevated the debate in the Committee's judicial nominations hearings above partisan personal attacks. He examined each nominee's integrity, qualifications, temperament, and approach to the law. While Senators sometimes disagreed on these issues, Senator Hatch is to be commended for not calling a series of nominations hearings at which panels of witnesses were called to attack judicial nominees. If there was a personal issue, he handled it privately, thus saving the nominee and the nominee's family much anguish. His fairness and gentlemanly demeanor was a credit to the chair he held, this Committee, and the Senate as a whole.

Today, we address the question of "should ideology matter" in the exercise of the Senate's advice and consent responsibilities. To answer this question, I must first

distinguish judicial philosophy, which describes a nominee's approach to the law, from result-oriented political ideology, which describes a nominee's view of who he or she would like to win the case. In my view, the Senate may appropriately examine a nominee's judicial philosophy, but should not assess a nominee based on some result-oriented political ideology or his political views.

Does the nominee understand that his or her role as a judge is to follow the law regardless of personal political opinion? Does he or she understand the role of precedent in interpreting the law? Can the nominee put aside political views, which may be appropriate as a legislator, executive, or advocate, and interpret the law as it is written? Will the nominee keep his or her oath to uphold the Constitution? The Senate needs to know the answers to these important questions. Questions that would implicate a nominee's view on what the result of a particular case should be, however, should not be asked.

The ultimate responsibility for the legal results, however, does not lie with the judge, but with the people and their elected legislators. In our democracy, that is where the responsibility for making rules is supposed to lie. For this allows the people, if they are unsatisfied with the rules, to change them through the democratic process of electing new federal and state legislators and through ratifying amendments to the Constitution.

I have heard some talk about the need for "moderate" judges. Again, it is important to distinguish moderation in terms of deferring to the policies embodied in the law from moderation in seeking politically palatable results.

On the one hand, Alexander Hamilton applauded the "benefits of integrity and moderation of the judiciary" whether the results of decisions were "disappoint[ing]" or the cause of "applause."[1] On the other hand, he *categorically rejected* moderation in a judge's duty to follow the law, concluding that "inflexible and uniform adherence to the rights of the Constitution, and of individuals, [is] indispensable in the courts of justice . . . ."[2]

For example, in *Brown* v. *Board of Education*,[3] the Supreme Court properly ruled that "separate but equal" public schools for the races violated the Equal Protection Clause of the 14th Amendment. The States were denying African American students equal protection through state education laws.[4] The Court's ruling, however, did not evoke a moderate public response, but a hue and cry from some who opposed its result. While this result may not have been moderate in a "political poll" sense, it was the proper course of action because it followed the law.

In the exercise of its advice and consent responsibilities, the Senate's duty does not lie with public opinion polls, professors' theories, or interest groups. Instead, as Senators, we solemnly swear to "support and defend the Constitution of the United States. . .So help [us] God."[5] We should ensure to the best of our ability that judges do the same.

THE RULE OF LAW

Some may ask, "Why do all these words like 'judicial philosophy' and 'moderation' matter? Isn't it the results in real cases that count?"

Judicial *philosophy does matter* because it determines whether results in real cases are consistent or not—whether you can count on the rules being followed every time. How many of you, would want your right to free speech[6] enforced only some of the time? How many would want your right to be free from unreasonable searches[7] enforced only when a judge felt it would be politically popular to do so? How many would want your right to not be discriminated against by state schools based on your race[8] enforced only if the judge liked you?

In America, we want our rights protected every time. This is the only way we can be sure that our contracts will be enforced in our business dealings, that our neigh-

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[1] THE FEDERALIST No. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
[2] Id. at 470–71.
[3] 347 U.S. 483 (1954).
[4] See Robert Bork, THE TEMPTING of AMERICA 74–84 (1990) (supporting the judgment in *Brown* v. *Board of Educ.*).
[5] "I, A—, B, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter: So help me God." 5 U.S.C. § 3331 (1988); Senate Rule III.
[6] U.S. Const. amend. I.
[7] U.S. Const. amend. IV.
[8] U.S. Const. Amend. XIV, § 2.

borhoods will not be overrun with criminals, and that our government officials will not abuse their power for their own advantage.

The Founding Fathers believed that the best way to ensure that the laws are followed every time is to write the laws down and to have government officials who will follow them. We call this the rule of law.

If the laws are unwritten, then judges and other government officials can make them up as they go along. Our rights would depend on the whims of judges—who are unelected. If the laws are written down, however, every judge and government official starts from the same page. This makes it more likely that they will be consistent in their application of the laws to all the cases before them. Our rights depend on the written laws and, in America, the people control what the laws say.

JUDICIAL ACTIVISM

To ensure that federal judges will actually follow the written law, we give them life tenure and salary protection. It is less likely that judges can be pressured to vote for things that Congress likes, even if they violate the Constitution, because Congress cannot threaten their jobs. Moreover, we require judges who have a conflict of interest in a case to recuse themselves from that case.

But there are other pressures that can influence a judge to not follow the written law—the judge's conscience, his or her desire for popularity, or his or her political views. Against these types of departures, salary protection, life tenure, and recusal requirements are of no help. The only safeguard we have is the President's and the Senate's examination of a potential judge's sense of duty to the law as written and as intended.

If a nominee's record shows that he or she will not follow the law as written and intended, that nominee is a "judicial activist"—whether conservative or liberal. Indeed, if a judge does not follow the law as written and intended, he harms all of us in two important ways.

First, it undermines our certainty in the protection of our rights. Will our contract to buy a house be enforced? Will criminals be let out of jail to sell drugs at schools? Will the government be allowed to take our property without just compensation? If the answers to these questions depend on the judge's personal opinion or political views, all of these rights are at risk.

Second, if a judge rejects the democratic process that ratified that constitutional provision or enacted that statutory provision, that judge has nullified our votes. Instead of our elected officials making the rules, our unelected judges would be making the rules. Frankly, this is scary.

Many have confused the issue of judicial activism by saying that it means a judge reaches a liberal result in a case or that it means a judge strikes a statute down. In my view, neither is correct. The dangerous sort of judicial activism occurs when a judge refuses to follow the law as written and intended regardless of whether the result is liberal or conservative, and regardless of whether the statute was struck down or upheld.

This judicial activism—or failure to follow the law as written and intended—has real consequences to real people. Take, for example, Sergeant Patrick Boyle who saw a federal judge release thousands of prisoners in Philadelphia. The law gives a federal judge the power to interpret the law, not to assume the executive duties of a warden. Nonetheless, the judge released the prisoners and within 18 months they had committed hundreds of new crimes, including 79 murders.[9] One of the murder victims was Sergeant Boyle's son. While the judge reached a liberal result in releasing the prisoners, it was judicial activism because she did not follow the law.

And there was a judge in New York who refused to punish protestors who harassed patients at an abortion clinic.[10] The F.A.C.E. Act requires that such harassment be punished. Nonetheless, the judge would not follow the law. Although I disagree with abortion, the F.A.C.E. Act prohibits such harassment and should have been enforced. While the judge reached a conservative result, it was judicial activism because he did not follow the law.

Further, if Congress passed a law prohibiting public speeches that criticized Senators, the current Supreme Court should strike it down 9–0. This would not be judicial activism, but would be in accord with the clear command of the Constitution

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[9] *Judicial Activism Defining the Problem and its Impact: Hearings before the Subcomm. On the Constitution Federalism and Property Rights of the Senate Comm. on the Judiciary*, 105th Cong., 47–48 (1997) (testimony of Patrick Boyle).

[10] *United States* v. *Lynch*, 952 F. Supp. 167 (1997).

that "Congress shall make no law . . . abridging the freedom of speech."[11] Indeed, upholding such a law despite the words of the Constitution would be activism whether liberal or conservative speech was silenced.

As for me, I am not willing to trade reaching politically palatable results in a few cases for certain application of the same rules to the highest government official and the most humble citizen in all cases. I am not willing to trade some judge's view of political justice for that described on the face of the Supreme Court Building—"Equal Justice Under Law."

CONCLUSION

In my view, the President and the Senate should work together to appoint qualified, fair judges who will follow the law. Today, while the Senate leaders continue to negotiate the peripheral issues of whether controversial nominees will receive a floor vote or whether a blue slip will be public, I urge Chairman Leahy to join the other Democratic Chairmen of the Armed Services, Banking, Veteran Affairs, Indian Affairs, and Foreign Relations Committees in starting to move forward in a bipartisan manner to hold hearings on judicial nominees. We now have blue slips returned and American Bar Association ratings of qualified or well qualified for several nominees that await a hearing. I am hopeful that Chairman Leahy, who appreciates and respects the federal judiciary and the Senate, will move promptly to provide judicial nominees with fair hearings.

Thank you, Chairman Schumer. I look forward to listening to the statements from the other Senators here today and to hearing from our distinguished witnesses.

Chairman SCHUMER. Thank you, Senator Sessions.

Senator Feingold?

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman. I certainly commend you for calling this hearing on the Senate's role in the selection of the Federal judiciary, and particularly on the question of the role of ideology in the judicial selection and confirmation process.

This, of course, is an extremely important topic for our committee, and I know that we all take our role in this process very seriously. I look forward to the testimony of the witnesses and appreciate their willingness to help us sort through some very difficult but absolutely crucial issues.

Let me begin by noting, as I did earlier this year, my view that nominations to the Federal judiciary differ from nominations to the President's Cabinet. I believe that the Senate owes the President perhaps the most substantial deference in the selection of the Cabinet. This deference flows in large part from the language of the Constitution which imposes on the President the duty faithfully to execute the laws of the Nation.

I believe these considerations do not apply with equal force in the selection of the Federal judiciary. While in the constitutional scheme Cabinet members and other executive branch officials work to carry out the will of the President, our Constitution intends that the Federal judiciary will act independently as a check and balance on the executive and legislative branches of the Government.

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[11] U.S. Const. amend. I. In contrast, in 1934, in *Home Building & Loan Ass'n* v. *Blaisdell*, the Supreme Court upheld a statute passed by a State legislature that abrogated mortgage contracts despite Article I, Section 10 of the Constitution which clearly provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." This was activism because the Court did not follow the clear command of the Constitution, but assumed the role of active policy-maker itself.

An independent judiciary has been the hallmark of our constitutional system of checks and balances. The Founders knew well the writings of William Blackstone, who said in his Commentaries, "In this distinct and separate existence of the judicial power consists one main preservative of the public liberty which cannot subsist long in any state unless the administration of common justice be in some degree separated both from the legislative and also from the executive branch."

The Constitution confers on the President the power to submit judicial nominations to the Senate, but I don't think the President is entitled to pack the judiciary with highly ideological judges. And the President is not entitled to pack the judiciary with judges certain to support the President's views on virtually all issues, such as a woman's right to choose, affirmative action, federalism, and church/state relations.

The Federal judiciary is fundamental to protecting and advancing the rights of citizens and the rule of law, which forms the foundation of our Nation's economic and social well-being. We on the Judiciary Committee have a responsibility to protect the independence of the judiciary. We serve that responsibility when we given a high level of scrutiny to judicial nominees.

The distinguished chairman, Senator Schumer, has expressed three touchstones for his evaluation of judicial nominees: excellence, moderation, and diversity. I share his view, but would add at least two touchstones of my own—fairness and open-mindedness. In other words, I would stress the ability of the nominee to conduct himself or herself as a judge, as that term is usually understood by most Americans.

Senator Sessions and I have served together on this Committee for 6 years, but we do see the recent past differently.

I just saw a different picture, Senator. We get along well as colleagues, but I saw a very different series of events. I thought the Republican majority in the Senate badly mistreated President Clinton's judicial nominees. I, for one, believe that some Republicans essentially refused to recognize that President Clinton won reelection in 1996 and too often treated every year after that as an election year as they considered judicial nominations.

I believe that the time has come to end this cycle of recrimination, if we can, but it is not up to the Senate, now under Democratic control, to unilaterally call a truce. The President must lead. I call on the President to act boldly and begin a new era of cooperation on judicial nominations. That means engaging in true and meaningful consultation with the Senate on his nominations, and I think it means recognizing the improper efforts of his party to block President Clinton's nominees by renominating those who received the most reprehensible treatment.

If he does that, I think he will find a lot of Senators willing to follow his lead and it would be an historic step. If he does not, this Senator stands ready vigorously to exercise his right and responsibility to advise and consent on nominations. I shall resist efforts to pack the judiciary simply with idealogues, and I am certain in that regard, Mr. Chairman, I won't stand alone.

Thank you.

Chairman SCHUMER. Thank you, Senator Feingold.

We have three members of the full committee, or two will soon be of the full committee, we hope, who are not members of the subcommittee, but this is an important hearing and I would recognize them for opening statements, just asking them to be a little mindful of the time since we have a vote at 11:30.

STATEMENT OF HON. JON KYL, ARIZONA, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Thank you. Mr. Chairman, as a member of the full Committee and almost the Chairman of this subcommittee, or now your ranking member, I appreciate the opportunity to be at this hearing. I kind of regret that I didn't take that assignment, but my colleague, Jeff Sessions, wanted it and he will do far better than I. In any event, I appreciate your courtesy in allowing us to make a brief opening statement.

I find it interesting that the argument that a candidate's ideology should be a sufficient rationale for rejection is characterized as a bipartisan approach. I would think that bipartisanship would mean quite the opposite. Cooperation with the President on a bipartisan basis I don't think begins with a threat that we are going to reject your nominees, no matter how competent they might be, if we don't like their political ideology, as we interpret it to be.

I think we should make no mistake that what is being suggested here is a significant departure from the way that nominees have traditionally been treated. Have there been exceptions? Quite assuredly so, but they prove the rule because they are exceptions to that general deference that has always been given to the President's nominees.

From a bipartisan point of view, it concerns me because I do believe it puts us on a very dangerous path of confrontation and contention here within the Congress, as well as in our relationship with the President, and also, as Senator Sessions has said, creates a very bad precedent.

I also found it interesting that the Chairman alluded to President Bush's campaign theme and frankly the reaction to that by his opponent, who made it clear that if President Bush were elected, he would be putting strict constructionists like Justice Thomas and Justice Scalia on the Supreme Court.

That, of course, I think was a correct characterization of the tradition that a President does do that. A President has that right when he is elected, and he has been elected, by the way, even though it was a close election. President Bush is the President, and I think the Democrats who campaigned against him on the basis that he would try to appoint people that were consistent with his judicial philosophy were correct in saying that he would do that, that that would be the end result, because the Senate has always confirmed nominees more or less of the President elected, regardless of how close the election was. President Clinton, after all, never had a majority of the citizens of this country vote for him, but we gave significant deference to his nominees.

I think that it is a difference between a judicial approach rather than a political ideology. If you question that, look only to Justice Scalia, one of President Bush's favorite Justices, as he said, who just recently reached a result consistent with his judicial philos-

ophy that I was a little concerned about politically because it restricted the police's right to gather evidence about what was going on in someone's home. He very strictly construed the Fourth Amendment as, in his view, prohibiting the police activity to advance law enforcement in the *Kyllo* case. That is, I think, a good recognition of the difference between a judicial philosophy and political ideology.

I will just conclude with this point. For us in the Senate, all political figures, to assume that we can, with blindfolds over our eyes, maintain a balance on the Court at any given time, I think, is sheer folly. Would any of us have wanted to retain the balance on the Court after the *Dred Scott* decision? That is not the way it works.

I would defy my colleagues to define balance today. I just have three quick examples here. On a 5–4 decision in the *Kyllo* case, Scalia's majority was joined by Justices Souter, Thomas, Ginsburg and Breyer. Justice Stevens' dissenting decision was joined by Rehnquist, O'Connor and Kennedy. Now, that is an interesting balance. Is that the balance we want to preserve? If so, I defy my colleagues to figure out how to do that.

Contrast that in the equal protection case, the so-called *Nguyen* v. *INS* case that Justice Kennedy wrote for the majority, and his majority was comprised of Rehnquist, Stevens, Scalia and Thomas. O'Connor wrote the dissent, joined by Ginsburg and Breyer. Well, that is an interesting balance. Is that the balance that we want to preserve here?

Or the two flag-burning cases in which Justice Brennan's majority opinion—this was back in 1989—was joined by Marshall, Blackmun, Scalia and Kennedy, and Rehnquist, Scalia and White dissented. Now, that is an interesting balance. Should we preserve that balance?

My point is that for us as political figures—and this is our milieu, politics—to try to translate our political views onto a Court's job and maintain balance by our confirmations, I think, is sheer folly. Instead, we should all revert to what has traditionally been our role, judging the competence of the candidate; the qualifications, including judicial temperament, the background; and also some look at judicial philosophy.

We are going to have some differences of opinion on judicial philosophy, but at a minimum it should be to adhere to precedent, to try to interpret the Constitution as honestly and in conformance with the rule of law as possible, and to allow injection of political ideology into the process. So it seems to me that we are on a very slippery slope, Mr. Chairman, when we begin to assert that pure ideology is a basis for rejection of the President's nominees.

Thank you.

Chairman SCHUMER. Thank you, Senator Kyl.

STATEMENT OF HON. MITCH MCCONNELL, A U.S. SENATOR FROM THE STATE OF KENTUCKY

Senator MCCONNELL. Thank you, Mr. Chairman. I first began to deal with the Senate's advise and consent role as a staffer here in 1969 and 1970 to a member of this Committee during the Haynesworth and Carswell nominations, and subsequently wrote

the only law journal article I wrote as a young man on that subject after those contentious nominations were concluded. I believed then and believe now that the appropriate role of the Senate is largely as Senator Kyl suggested, which is to judge the competence and the integrity and the fitness of a judge to be on the bench.

I dutifully returned, gagging occasionally, every single one of the blue slips I received during the Clinton years positively. My view then and my view now is that the President won the election, no matter what the margin, and is entitled for the most part to tilt the judiciary in the direction that he feels appropriate.

As Chairman of what we have come to call around here the Gang of 5, the G–5 group, over the last two or 3 weeks I have been involved in the issue in a different way, which is to discuss the appropriateness of making blue slips public, something we should have d1 years ago, and establishing for this Congress, and for that matter forever, as far as I am concerned, if we can do it, that Supreme Court nominees will ultimately be voted on by the full Senate. That is the tradition going back to 1880 for Supreme Court nominees to be determined by the full Senate. Nowhere in the Constitution is it suggested that advise and consent means only the Senate Judiciary Committee. That is just a starting place. In fact, at the end the full Senate ought to make these determinations.

What I fear is going on with the hearing today is trying to establish a new litmus test for the Senate that has not existed in the past. I don't understand why we are seeking to do that. As Senator Sessions pointed out, and I think Senator Kyl alluded to this as well, 377 of President Clinton's nominees were approved. During 75 percent of his term, there was a Republican Senate here. During President Reagan's years, during which he had during 75 percent of his tenure in office a sympathetic Senate, only a few more were confirmed, 382.

So what I fear is going on here is an effort to establish a new standard under which nominees are judged and a litmus test is established that substantially is at variance with the majority of the American people. What appears to be happening—and I hope this will not prove to be the case—is that some on the left are increasingly dedicated to shutting down the vibrant marketplace of ideas and replacing it with a monopoly of thought where the only commodity to be bought is a kind of liberal orthodoxy.

Their reason is that the conservative views are not "in the mainstream." Well, I can't see my chart over there, but I believe the first thing we have up is a six-point litmus test. What I fear is going on here is an effort to establish a litmus test where you have to support judicial activism, restrict First Amendment rights of political speech and association, oppose Second Amendment rights for law-abiding citizens, support partial-birth abortion, support racial preferences, and expand the Federal Government or, put another way, diminish the role of the States. Those are views that you have to espouse in order to be approved by this committee. Now, those are not the views out in middle America.

The other chart that I have put up sort of illustrates where most of the country is. The States in red on the chart are commonly referred to as middle America. I would suggest that most of those folks are in the real mainstream, people in Kentucky and Kansas

and Ohio. The odds are, if you are from those States, you will have middle American values. And if you do and you are nominated to the Federal bench, under what I think may be trying to be established here today and in the future, you may be unable to serve because your values are considered suspect or somehow outside the mainstream.

Well, where is the mainstream, I ask you? Where is the mainstream? All across most of America, in most of the States, I think the mainstream would be quite different from what may be underway here today to establish as sort of acceptable views things that are far different from what most Americans hold.

That is why the safest place to be and the sound place to be and the place where the Senate has been most of the history of our country is largely deferring to the President on the question of ideology and judging the competence and the integrity of the nominee.

The President was elected, not the editorial board of the New York Times. And as astonishing as it may sound to some here, the editorial views of the New York Times are not mainstream values. Those are not the values of the vast majority of Americans.

So I think we are going down, as Senator Kyl said, a slippery slope if we are trying to establish here the principle that this Committee should adopt the views of the New York Times editorial page, describe those as mainstream values, and anyone who doesn't hold them need not apply, and may actually die right here in this Committee and never even be considered by the full Senate of the United States.

I doubt if the Founding Fathers were aware that there would be a Judiciary Committee. It probably never occurred to them. When they said "advise and consent," I think they were talking about the full Senate. Certainly, the Founding Fathers did not envision that there would be a bunch of co-presidents here. They did, after all, give the power to nominate to the President.

So, Mr. Chairman, I hope that that is not the ultimate goal of this hearing to establish values, if you will, that are far removed from mainstream America, and say that if you don't hold those values, you can't be on the Federal judiciary. I hope that is not the way we are headed.

I thank you very much for the opportunity to make an opening statement.

[The prepared statement of Senator McConnell follows.]

STATEMENT OF HON. MITCH MCCONNELL, A U.S. SENATOR FROM THE STATE OF KENTUCKY

Determining what is the exact role of the United States Senate in the confirmation process is an important question, and I thank the Chairman for convening this hearing to try to answer it. From press accounts I have read, I am very concerned, however, that some of my colleagues have a much more specific, and a much more disturbing, goal for this hearing. That goal is to establish that it is somehow constitutionally incumbent upon this body to disqualify otherwise well-qualified judicial nominees simply because they are not on the left of the political spectrum. Once my colleagues and their supporters on the far left believe they have established this premise, I fear they will then work to block all judicial nominees who do not fall on the "correct" side of the political spectrum, as they define it.

This is a troubling proposition. It is one that does not bode well for the nomination process, nor for the rich intellectual tradition that has characterized our federal judiciary. One of the great traditions of our Republic has been the free exchange of thoughts, embodied in the metaphor of the "market place of ideas," where speak-

ers hawk their wares, bidding for the minds of men. Our judiciary has benefitted from what has been, up until now, our profound national commitment to diverse thought and rigorous debate. I cannot imagine how much poorer our legal tradition would be if it would have been deprived of the rich intellect of such different thinkers as Oliver Wendell Holmes, Hugo Black, William Brennan, and Antonin Scalia.

But unfortunately it appears that some on the left are increasingly dedicated to shutting down this vibrant market place and replacing it with a monopoly of thought, where the only commodity to be bought is liberal orthodoxy. Their reason? That conservative views are not "in the mainstream." Well, Mr. Chairman, I'm sorry, but the values of middle America are most certainly in the mainstream, and arguably embody it.

All these states in red-these states, commonly known as "middle America"-are "in the mainstream." [See Chart With Map] Kentuckians, for example, are "in the main stream." So too are Kansans and Ohioans. Odds are, if you are from these states, you will have middle-American values. And if you do, and you are nominated to the federal bench, you most likely will be unable to serve, because those on the far left are crafting a new, six-point litmus test to bar you from the bench. [See Chart With Bullet-Points]

Now, we are all familiar with litmus tests, but I'm afraid that some on the far left are taking it to new, disturbing levels. In their view, in order to serve as a federal judge, you must:

- Support Judicial Activism;
- Restrict First Amendment Rights of Political Speech and Association;
- Oppose Second Amendment Rights for Law-Abiding Citizens;
- Support Partial-Birth Abortion;
- Support Racial Preferences; and
- Expand the Federal Government by Diminishing the Role of the States

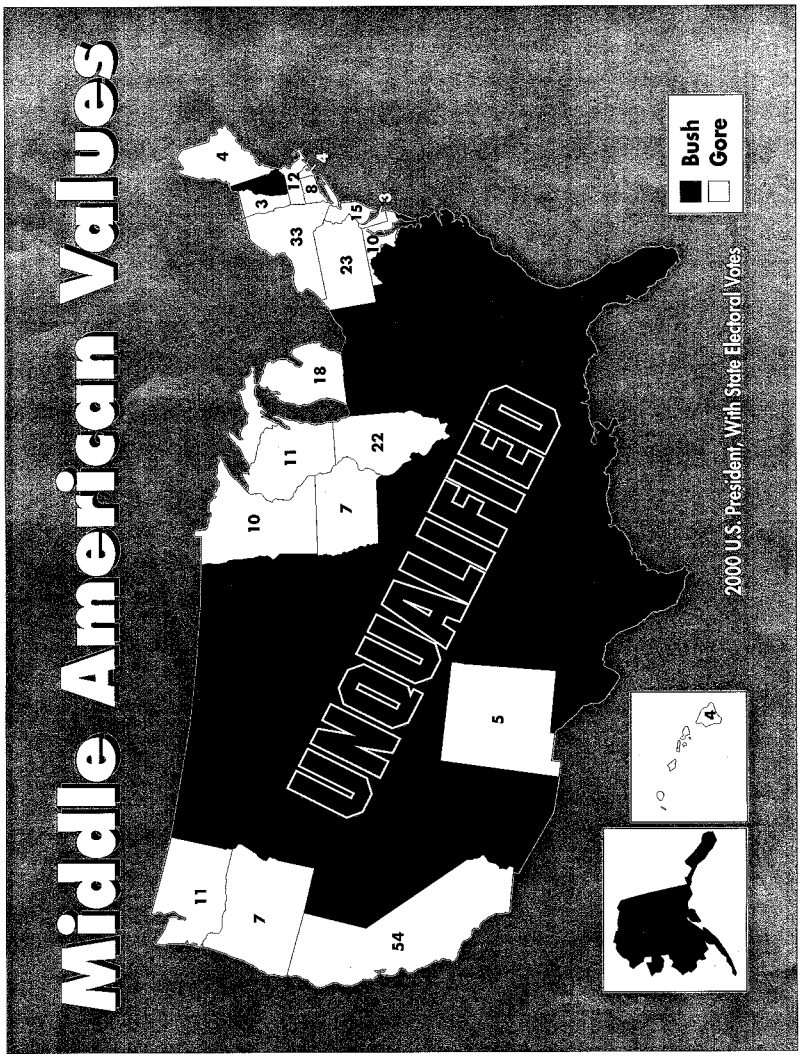
Under their approach, if a nominee is tripped-up by any one of these hurdles, he is unfit to serve. His education will not matter. His experience will not matter. His achievements, both personal and professional, will not matter, nor will the fact that he may have overcome numerous adversities, suffered untold hardships, and even received the approval of the ABA. It will not matter if he has fought for his country, given to his community, or sacrificed for his family. Because he is not the person whom the editorial board of the *New York Times* would have picked to serve on the bench, he is barred from service.

Over the years, people from time to time have objected to judicial nominees on the ground that their legal views were extreme. But until now, they have saved "Borking" for an unlucky few. Until now, they have not tried to convert the usage of "Borking" from an exception to the rule itself. They have not sought to disqualify an entire class of nominees from public service based on their philosophy. They have not essentially said, until now, that "Prolifers need not apply."

My colleagues, if we go down this road, we will have a meltdown in our nomination process. It will be mutuallyassured destruction that will cripple the federal judiciary. It is naive to think that such a dramatic escalation in partisanship will not, by necessity, be visited upon the next Democrat to occupy the White House. We therefore cannot allow "advise and consent" to become "demand and dictate." The Constitution does not provide for 100—or even 51—co-Presidents. So I caution my colleagues to be judicious in their objections to the well-qualified Americans who will come before them.

Voting for nominees of another philosophical stripe can be painful, but both sides have always done it. Most recently, I point to President Clinton's near-record number of 377 judicial nominees who were confirmed, *even though Republicans controlled the Senate for 75% of his term. For eight long years* I voted to confirm most of President Clinton's nominees, although there is no way I would have nominated most of these people if I were President because I disagreed with their judicial philosophy, sometimes vigorously so. But I did not wage some sort of jihad to stop them because, quite frankly, it was not appropriate for me to do so. Nor would it be appropriate now for my colleagues on the other side to bow to pressure from groups on the far left and wage an all-out war against well-qualified Americans who seek to serve their country. So, in closing, I would caution my colleagues to be mindful of the precedent they are setting, and to be wary of what they wish for.

Thank you.


Middle American Values
UNQUALIFIED
Bush
Gore
2000 U.S. President, With State Electoral Votes
4
3
12
8
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33
15
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54
4


FAR LEFT'S SIX-POINT LITMUS TEST
• Support Judicial Activism
• Restrict First Amendment Right of Political Speech and Association
• Oppose Second Amendment Rights for Law-Abiding Citizens
• Support Partial-Birth Abortion
• Support Racial Preferences
• Expand Federal Government/Diminish Role of States

Chairman SCHUMER. Thank you, Senator McConnell, and we won't ask you to substitute the views of the Courier Journal for those of the New York Times in your statement.

[Laughter.]

Senator MCCONNELL. They are indistinguishable. They simply rewrite them each day, one day later.

[Laughter.]

Chairman SCHUMER. The Senator from Kansas for a brief opening statement.

STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR FROM THE STATE OF KANSAS

Senator BROWNBACK. Thank you, Mr. Chairman, and thank you for allowing me to participate during this reorganization period on the committee.

I think a number of my colleagues have expressed a high degree of concern of getting into an ideological set of litmus tests here on considering judicial nominations, and I would support those concerns. I think those are proper, I think they are wise. I think they are the sort of philosophy and thought that we should consider over a long period of time, the impact of inserting ideology in the matter.

I have always given the President, regardless of his political affiliation, a good deal of deference on his nominees, or her nominees in the future, to the Federal bench. However, I have heard some call for changes on this deference now because, while ideology has been discussed in the back rooms, now we should bring it out and openly bring it forward.

I don't think we should be inserting ideology in these matters, ideology for a liberal litmus test or a conservative litmus test, going either way. I would just like to take, if I could, Mr. Chairman, a few minutes to discuss the number of past jurists that we have had who would not make the bench today if we went on an ideological test.

Take, for example, Justice Hugo Black, a great liberal Justice, the architect of extending the Bill of Rights to the States. This Roosevelt appointee could not be confirmed under the new standard because he did not believe that the Constitution's test provided protection to contraception, and he did not believe that the Equal Protection Clause prohibited poll taxes for State elections.

Let's look at Felix Frankfurter, a liberal intellectual who advocated validating New Deal legislation under the Commerce Clause. This Roosevelt appointee could not be confirmed under the new standard because he did not believe that the First Amendment prohibited schools from requiring students to salute the American flag. He did not believe that the Fourth Amendment required the exclusion of evidence seized by State police officers without a warrant. He did not agree that the Equal Protection Clause required reasonable apportionment among State voting districts.

Justice Byron White, President Kennedy's appointee, a respected Yale Law graduate, could not hope for confirmation under the new standard. He did not believe that the Constitution included a right to an abortion.

Justice Lewis Powell, a philosophically moderate president of the American Bar Association who worked to implement desegregation in Richmond's public schools, could not be confirmed under the new standard. He could not be confirmed because he believed that, while race could be considered in university admissions, racial quotas could not be used.

Oliver Wendell Holmes, the great dissenter from the pre-New Deal Courts, couldn't be confirmed. He looked at use of substantive due process to strike down labor laws, and was an avid defender of the Free Speech Clause. He would have trouble. After all, he affirmed a State law providing for the sterilization of the mentally ill.

Louis Brandeis, a great liberal craftsman, could be disqualified based on his views on federalism. He voted to strike down a Federal tax on child labor as invading the sovereignty of the States, and believed that the headlong drive for national power by the supporters of the New Deal threatened to destroy one of the great bulwarks of liberty, that being federalism. He later voted to strike down pieces of New Deal legislation as beyond Congress' commerce power and as an unconstitutional delegation of power.

Finally, what about Earl Warren, the author of *Brown* v. *Board of Education*, a great decision in my hometown, and a champion of civil rights? He could have a tough confirmation battle under the new standards. After all, he took the reactionary position of not supporting extension of the First Amendment protection to flag-burning.

If a Democrat President nominated such individuals, most of whom would be left of center, a Republican Senate would give them due deference, and I think it would be wise that they would. Likewise, if a Republican President nominated qualified nominees who were mostly right of center, I think a Democratic Senate should give them due deference as well.

Yet, to some special interest groups, the above nominees would be too extreme. Perhaps the real extremism is being employed by those artfully using the terms "balance" and "moderation" to set the stage for ending deference to the President and excluding perfectly qualified nominees.

Mr. Chairman, I make those comments and those examples because I think if you take any single nominee and you pick one thing, two things, maybe three things out, you can find an ideological reason that they should be excluded. I listed some of the great jurists of this country's history, and would we exclude all of those today from serving on the Court? I would hope not. But I think if we start going down this road of saying that ideology is the litmus test that we are measuring on, we have the opportunity of blocking some of the great people that could serve on the bench and I think that would be a wrong step for us to take.

Thank you.

Chairman SCHUMER. I thank the Senator, and thank all of my colleagues for statements.

I would just say in reference to the Senator from Kansas, no one is saying that a single issue should block any judge. The question—and we are trying to explore this question, and I regret that some of my colleagues seem so defensive about an exploration of what

has been a time-honored discussion—is whether their views on those issues or other issues should enter into the discussion as we evaluate them. But evaluation does not equal a litmus test, and in the past, at least, it seems to me that we have avoided even evaluation on those issues and it is a very open question as to whether that should continue.

We will have some great witnesses, whom we will get to right now, to discuss that, and so let me thank them for their patience and for their being here. We have two gentlemen who have been extremely involved, of course, in the Presidential part of the selection of judges and Justices, and let me call on both of them.

First, Lloyd Cutler is a partner and senior counsel in the Washington law firm of Wilmer, Cutler and Pickering. From 1979 to 1980 and in 1994, he served as counsel to Presidents Carter and Clinton. Mr. Cutler is a graduate of both Yale College and Yale Law School, and a founder and former co-chairman of the Lawyers Committee on Civil Rights under Law. He has also served as the co-chairman of the Committee on the Constitutional System, a member of the American Law Institute, and trustee of the Brookings Institution. He is testifying today in his capacity as a co-chair of the Constitution Project's bipartisan Courts Initiative. I want to thank Mr. Cutler for joining us.

Immediately after him, we will hear from C. Boyden Gray. Mr. Gray is presently a partner in the Washington, D.C., law firm of Wilmer, Cutler and Pickering. Mr. Gray graduated from Harvard College magna cum laude, and first in his class from the University of North Carolina Law School, where he served as editor-in-chief of the UNC Law Review.

Following graduation from law school, he clerked for Chief Justice Earl Warren of the U.S. Supreme Court for a year. He served as legal counsel to Vice President George Bush from 1981 to 1989. Mr Gray later served as counsel to President Bush from 1989 to 1993.

I want to thank both of you for coming. Your entire statements will be inserted into the record.

Mr. Cutler, you may proceed.

STATEMENT OF LLOYD N. CUTLER, CO-CHAIR, CONSTITUTION PROJECT'S COURTS INITIATIVE, AND FORMER WHITE HOUSE COUNSEL, WASHINGTON, D.C.

Mr. CUTLER. Thank you very much, Mr. Chairman and members of the committee. Since you referred to our law firm twice, I should note for the record that Boyden and I were law partners there before either of us became counsel to a President.

In listening to the opening statements, I couldn't help noticing your differences on what I call ideology begin with how to pronounce it. You, Mr. Chairman, Senator Feingold and Senator Kyl all say "ideology." Senator Sessions and I say "ideology." It seems to be a question of "you say tomato and I say tomato." Perhaps the best answer to it all is Potter Stewart's famous remark about pornography that he could not define it, but he knew it when he saw it. Perhaps that is equally fair about ideology.

I have served on these two national committees that you referred to, one run by the Miller Center at the University of Virginia, in

1999, and the other run by the Century Foundation, and you have just referred to that as well. There conclusions on this issue of ideology are set forth in their reports, and I want to read only one extract from the Miller Center report which essentially agreed to in the later 1999 report of the Century Foundation.

The Miller report: "What is most important is the appointment of judges who are learned in the law, who are conscientious in their work ethic, and who possess what lawyers describe as 'judicial temperament.' That term, difficult to define, essentially has to do with a personality that is evenhanded, unbiased, impartial, courteous yet firm, and dedicated to a process, not a result. The law will be fairly read and applied, irrespective of the judge's personal views as to its wisdom; where the judge is the finder of fact, the facts will be fairly found."

"As this Report recognizes, throughout our history the appointment process has been built on politics. . .The Commission believes it would be a tragic development if ideology became an increasingly important consideration in the future. To make ideology an issue in the confirmation process is to suggest that the legal process is and should be a political one. That is not only wrong as a matter of political science; it also serves to weaken public confidence in the courts. Just as candidates should put aside their partisan political views when appointed to the bench, so too should they put aside ideology. To retain either is to betray dedication to the process of impartial judging. Men and women qualified by training to be judges generally do not wish to and do not indulge in partisan or ideological approaches to their work. The rate exception should not be taken as the norm."

Now, we recognized in both commissions, and I personally recognize that there is a very fine between ideology and other considerations. Is the candidate judicious? Is he fair and open-minded? Are his decisions prepared and presented in a way that is likely to be accepted as having those qualities by the general public? And is his personal conduct beyond reproach? All of these are legitimate questions for an administration nominating judges and for the Senate in deciding whether to confirm them.

As many of you have noted, Senators can and do reject candidates on the ground that they are ideological, but they need to ask themselves is this within the ambit of appropriate advice and consent? That, of course, at least in my view, is up to the Senators themselves to decide in the first instance.

But just like Presidents and members of the Department of Justice and White House Counsel, they should be careful to limit their interrogations as to a candidate's stance on issues about to reach the court. As I said, the same thing also applies to the President and the Department of Justice.

Candidates should decline to reply when efforts are made to find out how they would decide a particular case. And most important—and this has been a recent tendency at least in my last experience as White House Counsel—interest groups should eschew—a real lawyer's word—personal attacks on candidates to defeat those they want to keep off the bench.

There have been cases that I know about personally in which an interest group who wanted to block a particular candidate literally

tried to find some dirt, something to do with sexual behavior or whatever, to spread against that candidate to keep him off the bench.

What seems to be the saving grace in all of this is the so-called Good Behavior Clause, that judges should serve during their good behavior. Something happens to a judge when he is nominated, confirmed and put on the bench because of the Good Behavior Clause. He is no longer worried about will he get reappointed. He will often confound the President who appointed him, or even the Senators who voted in his favor.

There is a famous story which I am sure the scholars will refer to about President Lincoln and Samuel P. Chase, who was then in the Lincoln Cabinet. This is, of course, the legal tender case in which the Court split evenly 4–4 on whether the Federal Government had the right to issue paper money as an emergency measure during the war.

Lincoln wrote to a friend that "we cannot ask the man how he would decide the case on reargument, and if he should answer us, we should despise him for it. Therefore, we must pick a candidate of whose views we are absolutely certain." And he went ahead and picked Secretary Chase, who had been a member of Lincoln's Cabinet and who had presented the legal tender bill to the Congress and had gotten it enacted. And in the outcome, Senator Chase, on rehearing, cast the deciding vote against the very statute he had helped to present.

I see we are limited in time.

Chairman SCHUMER. Please proceed. We will shut off the light.

Mr. CUTLER. Just one more quick point, and that is the point made by Professor Charles Black, who has been of our greatest students of the Supreme Court, and that is that the Court is the lynch pin of the whole constitutional system because it is the Court which validates most of the acts of the Executive and the Congress in a way that the public will accept, in a way that reassures the public.

Of course, in the course of performing that duty, the Court occasionally, but only occasionally, knocks out a particular statute or a particular example of egregious Executive action. But its main function is to validate what the other two elected branches do, and to do it in a way that convinces the public that most of the actions of the Government are acceptable.

The Court, as others have referred to—Senator Kyl, I think, about the *Dred Scott* case—has not always been the most popular institution in the country by far. The *Dred Scott* case itself, dealing with whether former slaves are really citizens within the meaning of the Fifth Amendment; the law invalidating the income tax—there are a number of other examples in which the Supreme Court was looked on as the defender of property rights, the upholder of the rights of the rich against those of the less fortunate.

All of that changed with the Warren Court, my colleague Boyden Gray's distinguished Chief Justice for whom he served as law clerk. Ever since the days of the Warren Court, most members of the public have come to believe that the Court is the protector of the rights of all citizens, rich and poor. And that is the Court's most important function, and that function is less likely to be performed

well by idealogues of the extreme left or the extreme right. It takes centrists to arrive at results which the general public will accept and feel reassured were confirmed by a dispassionate, law-abiding Court.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Cutler follows:]

STATEMENT OF LLOYD N. CUTLER, CO-CHAIR, CONSTITUTION PROJECT'S COURTS INITIATIVE, AND FORMER WHITE HOUSE COUNSEL, WASHINGTON, D.C.

I have served on two national commissions dealing with how to improve the process of nominating and confirming federal judges. Both have taken up the ideological issues that are the subject of your hearing today. The first commission, created by The Miller Center of Public Affairs at the University of Virginia, filed its report in 1996. The second, created by the Century Foundation and called Citizens for Independent Courts, filed its report in 1999.

My views on the role of ideology in the nominating and confirming process are set forth in these reports. They are incorporated in my statement. I will read a few key paragraphs from-each:

First The Miller Center report in 1996:

"What is most important is the appointment of judges who are learned in the law, who are conscientious in their work ethic, and who possess what lawyers describe as "judicial temperament." That term, difficult to define, essentially has to do with a personality that is evenhanded, unbiased, impartial, courteous yet firm, and dedicated to a process, not a result. The law will be fairly read and applied, irrespective of the judge's personal views as to its wisdom; where the judge is the finder of fact, the facts will be fairly found."

"As this Report recognizes, throughout our history the appointment process has been built on politics. The danger of purely political appointees lacking the necessary competence led Attorney General Brownell to introduce the American Bar Association's participation in the process. At that time—and for some years thereafter—relatively few persons in the Executive Branch and the Senate or its staff worked on judicial appointments, and rarely were any of them, even when lawyers, experienced in court practices and procedures. The ABA Committee was designed to fill that lack and insure, insofar as the political process permitted, the high quality of those selected."

"In addition to the growing number of appointments, the changing political process has had its impact on who the candidates for judicial office are and whether they will be nominated and confirmed. The increasingly ideological nature of political campaigns, the need for huge sums of money, the growth of dependence on contributions from various ideological groups, and the willingness of these groups to launch personal attacks on candidates they ideologically oppose, has the potential to affect the appointment process in unfortunate ways. Even putting aside the cases of Supreme Court nominees such as Robert Bork and Clarence Thomas, where this problem was obvious, there have been some signs of similar ideological controversy creeping into the process of nominating and confirming lower court candidates. While it appears that the present administration has been conscious of the problem and relatively successful in avoiding such ideological controversies, we have learned of occasional episodes where qualified candidates have refused to be considered or have withdrawn from fear of being "Borked."

The Commission believes that it would be a tragic development if ideology became an increasingly important consideration in the future. To make ideology an issue in the confirmation process is to suggest that the legal process is and should be a political one. That is not only wrong as a matter of political science; it also serves to weaken public confidence in the courts. Just as candidates should put aside their partisan political views when appointed to the bench, so too should they put aside ideology. To retain either is to betray dedication to the process of impartial judging. Men and women qualified by training and experience to be judges generally do not wish to and do not indulge in partisan or ideological approaches to their work. The rare exception should not be taken as the norm.

In any case, it is our view that the important process of appointing federal judges need not be as difficult as it now seems. The ultimate question is simply whether or not potential candidates have the qualities of integrity, good judgment and experience to become judicial officers of the United States. Occasional mistakes will be made. But no amount of bureaucratic vetting or testing for ideology will achieve perfection, and too complex a process can do more harm than good."

Second, the Century Foundation Report in 1999:

Recommendations for Executive and Legislative Branch Reviewers on Ideology in Federal Judicial Selection

1. Candidates for judgeships should be committed to deciding cases based on the law and facts of particular cases, without the intrusion of any rigid ideological pre-commitments to certain results or approaches to the law.

2. Reviewers should investigate a candidate's experience, qualifications, temperament, character, and general views of the law and of the judicial role. Selecting a federal judge is not just a matter of picking a legal technician, for a person's judgments may well reflect one's broad values and commitments.

3. Reviewers must refrain from asking candidates for particular pre-commitments about unresolved cases or issues that may come before them as judges.

4. The limit on questions seeking pre-commitments should be applied by reviewers in a common-sense fashion. In particular, this limit should not be allowed to prevent a fully deliberative investigation into the backgrounds, qualifications, and judicial philosophies of candidates for judgeships.

5. The limit on questions seeking pre-commitments should be respected equally by the President and other executive branch reviewers as well as by senators and other legislative branch reviewers, despite differences in the roles played by the two branches in the appointment process.

6. The limit on questions seeking pre-commitments should apply with respect to candidates for courts at all levels of the federal judiciary.

7. Reviewers seeking to assess a candidate's views should exercise caution when evaluating a person's current or former clients, memberships, and writings or speeches.

8. The value of judicial independence is consistent with pursuing diversity on the federal bench.

9. The value of judicial independence is consistent with active involvement by bar associations in the selection process.

Rather than read these extracts from the two reports, I will file them for the record. After making a few personal observations of my own, I will be pleased to answer your questions.

Chairman SCHUMER. Thank you, Mr. Cutler.

Mr. Gray?

STATEMENT OF C. BOYDEN GRAY, FORMER WHITE HOUSE COUNSEL, WASHINGTON, D.C.

Mr. GRAY. Thank you, Mr. Chairman. Even though Lloyd and I come from the same law firm, we didn't cook up this testimony together. I am happy to see that we are not that far apart on this issue, although on others we do, of course, differ.

I would like to just summarize three points from my testimony quickly. I think it is entirely appropriate to ask questions about the general philosophy of a candidate in terms of how he views his role as a judge and the role of the judiciary, but I think it is very inappropriate to ask about specific cases or specific issues.

I remember very vividly as though it were yesterday coming down to the Senate in the beginning of the first Bush administration, meeting with Senators Hatch and Thurmond. The meeting was called by the chairman, Senator Biden, and Senator Kennedy was there. And we were told in no uncertain terms that if they caught us asking any potential nominee any questions about specific cases that that nominee would be flatly rejected.

We took that to heart, and I think that is reflected today in the Senate Committee questionnaire which asks, "Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue, or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such a case, issue or question?"

I would add that this is a bipartisan approach, and remind the Committee of what Senator Kennedy said in 1981 in defending Justice O'Connor's refusal to answer questions on abortion. He said, "It is offensive to suggest that a potential Justice of the Supreme Court must pass some presumed test of judicial philosophy."

The reason why targeting such issues as federalism for potential reversal is precisely because it challenges the independence of the judiciary and the Supreme Court, which independence is the cornerstone of our constitutional system.

The second point I want to make is that ideology or litmus tests have, in fact, never been the rule of application by the Senate. Many facts and numbers have been thrown out this morning by members of the committee. I won't belabor the point, but in the last 20 or so years the Senate has changed hands several times, and yet nominees have been approved at the clip of about 190 per 4-year term.

In the Reagan-Bush period, the Senate was held by the Democrats for 6 of the 12 years and by Republicans in the other 6. I don't think there was any basic difference in how those nominees were treated by the Senate, and the same I think is true in the Clinton period, about 190 per 4-year term.

Finally, party affiliation and perceived ideology—I question whether they are very good predictors of how judges will at the end of the day vote. Seven of the current members of the Supreme Court were appointed by Republicans. Yet, two of those seven are among the most liberal judges of the last period, and no one would say with certainty that they could have predicted how they would have voted, how their pattern of votes has emerged, at the time of their selection.

One of the most famous examples of a nominee not going along with the program of the President who appointed him is Oliver Wendell Holmes. Their relationship was strained as a result. I think they remained friends until the end, but it was not something which President Roosevelt took a lot of joy in.

The person for whom I clerked, the Chief Justice of the United States, Earl Warren, was viewed reputedly from the history books by President Eisenhower as a big mistake because he was thought to be so liberal. Yet, toward the end of his career he issued some opinions in areas of federalism which I think today would look conservative. His views on pornography, I think, today would be viewed as outright reactionary.

The point is that I don't know how you apply a litmus test fairly without creating the perception, if not in fact the reality, of again threatening the very independence of the judiciary, which is such a central building block of our constitutional system.

Thank you very much.

[The prepared statement of Mr. Gray follows:]

STATEMENT OF C. BOYDEN GRAY, FORMER WHITE HOUSE COUNSEL, WASHINGTON, D.C.

Good morning, Mr. Chairman. Thank you for this opportunity to appear today. If the goal of today's hearing is to answer the question, "Should ideology matter?" I can answer in one word: No. The only legitimate question on this subject—from the White House, the Senate, the Judiciary Committee, or an individual Senator—pertains to the proper Constitutional role of a federal judge. The question is very sim-

ple: "What is the proper role of a federal judge, or of the federal judiciary?" If the nominee's answer is "to interpret and apply the law," or words to that effect, then you have a nominee who understands the limited role of a judge. If, on the other hand, a nominee views the judiciary as a vehicle for favoring particular interest groups or particular outcomes, then the nominee is unfit to be a judge and should consider running for legislative office instead.

Historically, judicial nominees have not been asked about their views. There simply were no hearings on judicial nominees until 1925. Even then, the hearings were perfunctory affairs for decades. When Byron White was nominated to the Supreme Court in 1962, the Judiciary Committee asked him eight questions and the hearing lasted 15 minutes.

In 1981, Senator Kennedy defended Sandra Day O'Connor's refusal to answer questions about her views on abortion. He said, "It is offensive to suggest that a potential justice of the Supreme Court must pass some presumed test of judicial philosophy."

As I said earlier, I think there is one legitimate test of judicial philosophy. But if the Senate—or the White House—asks overly specific questions, they threaten the independence of the federal judiciary by seeking advance commitments to rule certain ways in particular cases. In fact, the questionnaire that the Judiciary Committee sends to judicial nominees before its hearings makes clear that this is an unacceptable practice. The questionnaire asks, "Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue or question? If so, please explain fully."

Very early in the first Bush administration, when I was White House Counsel, I met with Judiciary Committee Chairman Biden and Senators Kennedy, Hatch and Thurmond. Senators Biden and Kennedy made it very clear, with Senators Hatch and Thurmond nodding in agreement, that a nominee would not be confirmed if the White House were caught asking questions about specific issues or cases.

Both Republicans and Democrats have been accused of using unfair, politically driven litmus tests in nominating or confirming judges. The criterion I have outlined is the closest thing to a proper litmus test because it only considers whether the nominee understands the proper Constitutional role of an unelected federal judge, which in turn indicates whether he or she understands the American system of self-government. In our democracy, decisions on major political issues should be made by the people and their elected representatives, not by unelected judges. This has been the prevailing and respectable point of view since our nation's founding. The alternative view—that judges can make decisions freely, without being constrained by the language of the Constitution or statutes—is an extreme position shared by almost no one. That's the view that should be described as extremist, because it lets judges do whatever they want, regardless of what the law says, and that should frighten Americans on both ends of the political spectrum. As Thomas Jefferson cautioned, if judges were allowed to interpret the law to be what they wish, the Constitution would be "a mere thing of wax in the hands of the Judiciary, which they may twist and shape into any form they please."

Some organizations and individuals have urged the Senate to just say no to judges nominated by a President of the other party. Before President George W. Bush was even inaugurated, before a single judge had been named or nominated, one group said it would fight so hard against his judicial nominees that "it will be scorched earth. We won't give one lousy inch." That hasn't been the historical approach, and I urge you to reject this political warfare. It threatens judicial independence at its most vulnerable and fundamental core.

During the twelve years of the Reagan-Bush era, Democrats controlled the Senate half the time. Yet the Senate confirmed 382 of President Reagan's judicial nominees and 191 of President Bush's nominees. During Clinton's presidency, Republicans controlled the Senate for six out of eight years, but they confirmed 377 of President Clinton's judicial nominees. It's safe to say that Republicans disagreed with the political preferences of many of these judges, but they voted down only one judge. And that is appropriate; rejections should be rare. Alexander Hamilton said in The Federalist Papers that judicial nominees should be rejected only for "special and strong reasons."

Ideology and party identification have never been very good benchmarks for ascertaining how a judge will decide future cases in controversial areas. There are seven Republican appointees on the current Supreme Court. Two of them are among the most liberal justices of the century, and most of them have supported the Court's decisions upholding *Roe* and striking down state partial birth abortion statutes. One such appointee—Chief Justice Rehnquist—supported the *Miranda* deci-

sion, and at least two conservative members of the bench render broad definitions of the procedural protections under the Fourth Amendment and are inclined to support greater judicial scrutiny of administrative agency action. Presidents, no doubt, try to identify nominees who will defend the White House's prerogatives, but history proves that such efforts are often pointless. Justice Oliver Wendell Holmes, for example, ended up thwarting the antitrust policies of the president who nominated him—Theodore Roosevelt. And, finally, justices do not always live up to the "label" they receive. Toward the end of his career, the justice for whom I clerked—Chief Justice Earl Warren—invoked federalism principles that might be considered "conservative" today.

But even if you reject the proposition that idelogy is not a good gauge, ideological inquiries are perilous because of the message they send to the public at large. If Senators focus on the results or outcomes in particular, people will simply view the judiciary as another political institution. Under this setting, law is just politics by other means.

One commentator recently has suggested that the country needs some activist judges on the bench to maintain some balance. After all, the last election was close, so the courts should "reflect the nation's profound ambivalence." Well, I don't know if we want to appoint profoundly ambivalent judges. After all, it's not uncommon for the White House and the Senate to be in the hands of different political parties, and we've never apportioned judicial seats on the breakdown of the vote in the last election. The Constitution assigns the appointment power to the President, and I think it's clear that the advise and consent role of the Senate does not include a pre-nomination function.

In conclusion, Mr. Chairman, the key criterion for judging a potential judge is not ideological, but philosophical and Constitutional: Does the nominee have the integrity to recognize the limited role of a judge and leave legislating to the legislators?

Thank you.

Chairman SCHUMER. Thank you, Mr. Gray.

Now, we will go to questions. We are going to have votes at 11:30 and we would like to finish this panel before then, so I am going to stick strictly to the 5-minute rule, if we might.

Senator HATCH. Mr. Chairman, could I ask a special privilege here, since I have to leave, if I could just make a short opening statement?

Chairman SCHUMER. We will take that as your 5 minutes of questions. Go ahead, go ahead.

Senator HATCH. I would appreciate it if you would.

Chairman SCHUMER. The Ranking Member of the committee, who has always treated us fairly, please.

STATEMENT OF HON ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Thank you, Mr. Chairman.

I want to welcome all of our witnesses here this morning. You are all eminent lawyers, all eminent people at your respective bars.

I want to thank Chairman Schumer for permitting me to say a few words on the important question of what role ideology should play in the judicial nominations process.

The shift of power in the Senate has focused a great deal of attention on the Judiciary Committee and how it will handle the confirmation of President Bush's judicial nominees. I hope that the heightened focus proves to be unwarranted and that the new Democratic majority will fairly treat President Bush's nominees to our Federal courts. In particular, fair treatment includes maintaining the committee's longstanding policy against injecting political ideology into the judicial confirmation process, and thus into the Federal judiciary.

There are myriad reasons why political ideology has not been and is not an appropriate measure of judicial qualifications. Fundamentally, the Senate's responsibility to provide advice and consent does not include an ideological litmus test, because a nominee's personal opinions are largely irrelevant so long as the nominee can set those opinions aside and follow the law fairly and impartially as a judge.

In our constitutional scheme, it is the members of the legislative branch, elected by the people and accountable to the people, who make our laws. When the voters do not like these laws, they can, and as we all know too well, they do vote their elected representatives out of office. This is what makes our system a representative democracy, founded on our faith in self-government.

Federal judges, by contrast, are unelected, have life tenure, and by design are not accountable to the people. Their power is nonetheless justified, indeed indispensable, to the extent it is only exercised by interpreting the written, duly enacted law. The role of Federal judges is quite simply to apply the written law, be it the Constitution or enacted legislation, to the case before them.

But when Federal judges deviate from the written law and decide cases based upon their own policy preferences or views of what is right and wrong, they in effect make up laws of their own, despite the lack of legitimate authority for doing so. When judges twist the language of legislation to enact the policies they prefer, they usurp the role of the legislature and destabilize the balance of power.

Even worse, when they read their own preferences and political agenda into the Constitution, judges directly thwart the will of the people, and voters have no recourse. As a result, entire spheres of policymaking are, in effect, ruled off limits from the people's elected officials and instead are usurped by imperial judges—all-knowing guardians of justice. This is what we call judicial activism and it represents a direct attack on the democratic principles that are central to our constitutional system, and it is wrong whether it comes from the left or from the right.

These are reasons why the Senate's appropriate role is not to probe the political ideology of nominees, but rather to make sure that the nominees will follow the law, not personal conviction, when deciding cases. When I discharge my responsibilities as a U.S. Senator to advise and consent, that is the test I apply, not political affiliation or views on any particular issue, but philosophy on a judge's limited role in our constitutional system of checks and balances.

Now that I have explained why we must keep political ideology out of the confirmation process, I would like to discuss some recent attempts to reinvent history by repeating the convenient myth that I, as chairman, blocked President Clinton's judicial nominees on the basis of political ideology.

At the outset, I must note that the confirmation statistics from the past 6 years demonstrate that the Republican-led Senate appropriately put aside the politics of judicial nominees. During President Clinton's two administrations, the Senate confirmed 377 judicial nominees. This is only five fewer than the number confirmed under President Reagan, who holds the all-time record.

There would have been three more than President Reagan had it not been for objections by Democrats to their own judges on the floor for various reasons.

This comparison is particularly relevant to the question of political ideology when you consider that President Reagan enjoyed 6 years of Senate controlled by his own party, while President Clinton faced 6 years of a Republican-controlled Senate. The overall rate of confirmation speaks for itself: the Senate confirmed 90 percent of President Clinton's judicial nominees. If Republicans had based their votes on partisanship or litmus test issues, there would have been but a few Clinton judges sitting on the Federal bench today, not a near record.

How did we accomplish the confirmation of 377 Clinton judicial nominees? Well, for one thing, I held prompt hearings on many nominees. For example, 20 Clinton judicial nominees received a hearing within 2 weeks of their nomination, 34 Clinton judicial nominees received a hearing within 3 weeks of their nomination, and 66 Clinton judicial nominees received a hearing within a month of their nomination.

In many months, I also held multiple confirmation hearings. For instance, in 1997 we held 3 hearings in September, 3 in October, and 3 in November. We often held hearings for more than 10 nominees in a month, and in other months as many as 15 or 16 nominees received a hearing. As a result, 377 of President Clinton's nominees are sitting judges on the Federal bench today, many of whom have political philosophies completely at odds with my own and other Republicans on the committee, in general.

Given this committee's recent track record, it is clear that the real question posed by this hearing is not the role of political ideology in past confirmations, but rather whether the Committee should now begin injecting political ideology into the process.

Mr. Chairman, I read press reports on a Farmington, Pennsylvania retreat that 42 Democratic Senators attended in late April. According to the reports, a panel discussed the need to scrutinize judicial nominees more closely than ever. One person who attended was quoted by the New York Times as reporting that "they said it was important for the Senate to change the ground rules and there was no obligation to confirm someone just because they are scholarly or erudite." It appears that today's hearing may represent the first step in a troubling attempt to accomplish the goal of changing the ground rules by altering the longstanding practice of avoiding any examination of political ideology beyond the question of whether nominees could put such ideology aside.

President Bush has indicated that he will not use social policy litmus tests in selecting judicial nominees, including nominees for the Supreme Court. Rather, he is focusing on qualifications, temperament, integrity, and a commitment to the rule of law. I believe this is consistent with the approach that our Founding Fathers envisioned and that Americans expect. I hope that my colleagues in the Senate will follow the same principles in their advice and consent role in confirming nominees.

Mr. Chairman, can I have just a few more minutes? I apologize to you, and I will get out of your hair the minute I finish. Is that OK?

Chairman SCHUMER. As long as you keep the second part of the promise for a long period of time, we will go with the first one.

[Laughter.]

Senator HATCH. It is my nature to not get in your hair.

In addition to the philosophical importance of judicial restraint in our system of Government and to the wide public support for an independent judiciary, there is also a very practical reason to keep politics out of the confirmation process. No one quite knows how to assess politics in this context.

Take, for example, the hearing held in 1990 concerning the nomination of then-Judge David Souter for the Supreme Court. At that hearing, Kate Michelman, Executive Director of the National Abortion Rights Action League, testified that "the Supreme Court is on the very brink of taking away an established fundamental constitutional right" and that "we are just one vote away from losing our right to choose."

Ms. Michelman said that she had "conducted a thorough and searching examination of his record" and concluded that she was "intensely concerned that, if confirmed, Judge Souter would destroy 17 years of precedent and cast the deciding vote to overrule *Roe* v. *Wade*." I argued that Judge Souter would be fair and would follow precedent. As everyone knows, the holding in Roe has been upheld since then and Justice Souter has proven to be a very reliable vote for the pro-choice position.

I respect Ms. Michelman and she has a right to believe what she wants. She is certainly not alone in being unable to use a nominee's political views, or perceived political views, to predict how that nominee will rule on future cases once confirmed to the bench. Indeed, history is replete with examples of judges who surprised even the very Presidents who appointed them.

President Eisenhower nominated liberal icons Earl Warren and William J. Brennan, Jr. If I recall correctly, President Eisenhower said he only made two mistakes in his presidency and they are both sitting on the Supreme Court. Now, that may have been his point of view. I don't know, but I happen to respect both of them. I may not have agreed with a number of their opinions, but they were both excellent jurists.

President Nixon nominated Harry A. Blackmun, the author and defender of Roe. And President Ford nominated John Paul Stevens, whom some consider to be the Court's most liberal Justice. Two of President Reagan's nominees, Sandra Day O'Connor and Anthony M. Kennedy, have voted repeatedly with Justice Souter to uphold *Roe* v. *Wade*.

It is even problematic to characterize the Court itself. It is fashionable in some circles to refer to the current Supreme Court as "conservative" and to conclude, despite the evidence, that the change of one Justice will inevitably result in a seismic shift in the Court's decisions.

But a thorough review of the cases demonstrates that the Rehnquist Court defies labeling and is marked instead by shifting and often unpredictable coalitions. In fact, while many conservatives expected that Reagan and Bush nominees would turn back Warren-era precedents, the reality is that those major precedents have not been overturned.

Even the Washington Post noted in an article after last summer's major decisions were handed down that the Court "mixes its high-profile messages." What this illustrates is that history often proves wrong those who seek to label the political ideology of individual judicial nominees as well as courts as a whole.

In sum, Mr. Chairman, the change of power in the Senate has focused media attention on the judicial confirmation process, as well it should. At the same time, the Democratic Senate leaders, despite a few intemperate comments by some members, have recently pledged to treat President Bush's judicial nominees fairly, and I personally honor and appreciate those sentiments.

This would be a particularly bad time to make the historic misstep of injecting political ideology into the confirmation process. Instead, we ought to renew our traditional focus of evaluating competence, fairness, integrity, and above all a commitment to enforcing to the Constitution and laws of this country as promulgated through our constitutional democracy.

Mr. Chairman, I also ask that a book review I wrote in 1986 in the Harvard Law Review on this subject, which commented on my good friend Professor Tribe's book, be made part of the record.

Chairman SCHUMER. Without objection.

Senator HATCH. I want to thank you again for holding this hearing. In spite of my views here, this is an important hearing and this matter should be discussed and it should be considered. But I want people to understand that President Clinton did not suffer by this committee. There were 41 holdovers left at the end of his 8 years. Nine of those were appointed within a short time before the end of the Congressional session, knowing that there was not enough time to process them. Of the 31 more, there were some problems with some, and some I just couldn't get through.

Contrast that with when the Bush Congress ended and the Committee was controlled by Democrats. There were 97 vacancies, there were 54 holdovers, and I think 6 of those were nominated within a short enough time that they could not have been considered. But that still left 48 holdovers, compared to our 31.

Now, the point I am trying to make is this: President Clinton won his first election with 43 percent of the vote. Did that mean that we as Republicans should have said he did not have the right really to appoint judges that he felt were very competent and important to be appointed to the bench and to the Supreme Court? No. I think he won his second election with less than 50 percent of the vote.

This last election was a close vote, but does that mean that President Bush should not be given fair consideration on all of our judgeship nominees, especially if he really is trying to do what I have just outlined here as his intent? The answer is no. We should treat whoever is the President fairly and we should not allow ideological concerns, if they are otherwise qualified, to interfere with the confirmation process, even though I know that there are always some in the Senate who have voted on pure ideological bases.

So I wanted to make these points because I have been very concerned about the judicial confirmation process throughout my 25 years in the Senate and on this committee. I really feel deeply

about it, and I hope that we can accord respect to President Bush's nominees just as we have, I think, to President Clinton's nominees.

I want to thank you so much, Mr. Chairman. You are wonderful to let me take this time.

Chairman SCHUMER. Thank you, Orrin. Let me just say first that this is not a hearing on who delayed who. There are different views about that, but you are not on any kind of trial here in any way. I mean, we have stayed away from that issue.

What we want to do is try and figure out, given the fact that there has been such discontent with how hearings and nominations have proceeded forward to have a thorough examination—as you see here from the list of witnesses, you have a Democratic counsel and a Republican counsel agreeing on this question. You will hear some tremendous testimony from other witnesses, some of whom agree, both on the left and right that ideology should be part of the process, some of whom disagree. That is a very important issue. That is not a litmus test. That is not rejecting a nominee because of one particular view.

I have been surprised at the defensive tone of some of my colleagues here. This is a fair-minded attempt to explore where we go, and the Constitution, if you read the Federalist Papers nd others—and our witnesses will address that—show that there has been a great deal of disagreement on this all along.

I would just ask one question because we do want to finish this panel, in fairness to the schedules of others, before the vote, and we will submit others for the record.

My question goes primarily to Mr. Gray, but I would be happy to hear Mr. Cutler answer it. Both of you have argued that ideology should not play a role in the process, that we should go for the qualifications of the judge, the intellectual excellence. As Senator Feingold mentioned, I have had three qualities for judges which many of my colleagues have adopted that I have chosen to bring forward. They were legal excellence, which we all agree with. The second was moderation. I don't like judges too far left or too far right. And the third was diversity. I don't think we should have a bench of all white males.

I don't think we have too much disagreement on No. 1 or No. 3. We may not even have disagreement on No. 2 in terms of everybody agreeing. I think somebody here mentioned that moderation is a good idea, but how do you find that moderation and how do you measure that moderation?

Now, let's just assume for the sake of argument—and I would ask this of Mr. Gray—that the White House, the President, whether it be Democratic or Republican, insists on ideology, that the nominees they send for the Supreme Court and for the bench by and large seem to have one consistent judicial philosophy which would be regarded by a Senator as clearly out of the mainstream.

Should Senators then have the right, the ability, the obligation to question that nominee on not simply their legal competence, not simply would they uphold the Constitution, but what their judicial philosophy is, which you would agree with, and where it takes them? That is the question.

During the Eisenhower era, as clearly mentioned by my colleagues, and even during the Nixon and Ford eras, there seemed

to be much less of an ideological prism by which judges were submitted. Excellence was the governing criteria.

It seems to some of us, by the preliminary renderings, by what the President said in his campaign, and by his initial nominations that ideology is playing a far greater role, whether or not they were asked specific questions about specific cases. I think that is a strawman in terms of the nomination.

How do we respond if, just assuming arguendo, that the White House is setting up much more of an ideological prism as to whom they would nominate?

Mr. GRAY. I can't really accept your premise that this current White House is doing something new in terms of ideology. I don't accept——

Chairman SCHUMER. Let me just read you a quote from yourself in the Wall Street Journal and you can interpret. You said, "If you think you have a legislative legacy and you didn't take care of the judicial side, you could lose it in the courts. I wouldn't think President Bush would trim his sails to accommodate the new majority in the Senate." That seems to me to be logical, practical and——

Mr. GRAY. Well, he shouldn't apply a reverse litmus test. He should do what he thinks is right, and if the Senate is going to start imposing a litmus test, then I think there is a problem. And I don't think there is any sign so far that I know of that suggests that the nominations that have already been made are somehow qualitatively, intellectually, ideologically different than any prior President. I just don't think that that case can be made.

Certainly, there are ways of ascertaining a person's approach toward the law. And the basic question, I suppose, would be, which I say in my testimony is perfectly legitimate, do you think that we ought to interpret law and not make them. A lot of nominees over the years have published lots of writings and you can inquire as to those in the hearings, and you will and you should and you have in the past.

I think if there were to emerge a candidate who really did have offbeat, extreme views, not about a specific case but about a general approach to life, I think that that would emerge and that would become clear. To paraphrase my partner, Lloyd, who paraphrased Justice Stewart, I think you would know it when you saw it. But I don't think, going in, you can set a standard for that, and it probably will happen very, very rarely.

I would say, of the ones that I know have been nominated by the current White House, I don't think there is an unusual individual in the group that has been nominated so far. I really don't think so.

Chairman SCHUMER. So again for the sake of argument, the White House has a strict guideline, whether it be left or right, not a litmus test, which tends to mean one issue, but they are just nominating people of a particular ideological caste.

Mr. GRAY. Well, that is not——

Chairman SCHUMER. Well, let's just assume it for the sake of argument. I quoted your quote here and many of us think that may be happening in the White House now, but let's not debate that. That is not the purpose here.

Let's just assume it was. Would it be appropriate for the Senate to ask questions about that and have that enter into their consideration as to nominations, or should the Senate, as long as they were legally excellent, just approve them? That is the fundamental question we face here.

Mr. GRAY. I think it is inappropriate to ask questions about specific cases and about specific areas of the law, such as federalism, such as Federal-State relations, such as church/state, because that would be to suggest that you are asking for a pre-commitment. The White House doesn't do this. No White House has done it in the past. I do not believe the current White House is doing it.

You have a right to ask them, if they are doing it. And if they are doing it, I think you have a right to say you are asking for a commitment yourself. I don't think you are going to find that to be the case, but I do think it is a legitimate inquiry. Your questionnaire asks the very same question.

Chairman SCHUMER. So you would say just to, for instance, ask a nominee their general philosophy of church/state would be inappropriate? That is what you just said.

Mr. GRAY. Well, you can get into questions of degree and we can sit here and argue about——

Chairman SCHUMER. I am not asking about a specific case.

Mr. GRAY. But asking about anything that begins to trench on a specific case, I think, would be inappropriate.

Chairman SCHUMER. Let's say it didn't.

Mr. GRAY. Then I think it is OK.

Chairman SCHUMER. Mr. Cutler?

Mr. CUTLER. I just want to add one word, and that is more by accident than design we have a Supreme Court today that satisfies most of your criteria. And to the extent that it is design, it is the design of the Constitution itself and the political system, at least once we adopted the two-term amendment.

Just in the nature of politics in the country and a two-party system, power shifts from one party to the other, and often the party in the White House has to leave it after 4 years or 8 years, or maybe in the Reagan-Bush case 12 years. If it were a matter of serving 10 terms as President, one party in control, I think there would be very serious question. By design, the composition of the Supreme Court could change in a left direction or a right direction, in what we have been calling an ideological direction.

Chairman SCHUMER. Thank you. I am going to submit other questions for the record in the interest of time.

I would ask my colleagues, because we have about 10 minutes to the vote, if we could wrap up between the two of you in 6, 7 minutes and then go vote.

Senator SESSIONS. Thank you, Mr. Chairman. I think it is important that we go ahead and talk about this. There has been so much talk outside about it. If there is any concern on the Republican side about where we are going, I think it would arise from the fact that most of us felt that the Bork hearings and the Rehnquist and Thomas hearings were unfair, that it consisted of panels attacking nominees in ways that I don't believe were justified and were really unseemly in many ways. Then we had earlier this Congress when

the Democrats were in the majority the Ashcroft hearing which followed that same pattern. I was really disturbed about that.

But back to the subject, I am very much impressed, Mr. Cutler, with your comments and the fact that you have been on two national commissions that have dealt with this. I practiced before Federal judges full-time for 15 years when I was a United States Attorney and Assistant United States Attorney. I had to go before them everyday. I have been before State judges, and Federal judges are better, in my opinion, in general. You get the law ruled on. If you are right on the law and you have got your brief and the evidence should go in, the evidence goes in. It is less certain of that in most State courts, in my view. I have criticized Federal judges, but, in fact, I respect them to the greatest degree.

I want to pursue a little bit the Miller Report you referred to and the comments that you made. As a practitioner of the law, I think this is so close to being correct about what we should think about. The report said, and this was 1996, "What is most important is the appointment of judges who are learned in the law, who are conscientious in their work ethic"—it is hard work to be a Federal judge today; if it wasn't in the past, it is today—"and who possess what lawyers describe as 'judicial temperament.' That term, difficult to define, essentially has to do with a personality that is evenhanded, unbiased, impartial, courteous yet firm, and dedicated to a process, not a result. The law will be fairly read and applied, irrespective of the judge's personal views as to its wisdom. Where the judge is a finder of fact, the facts will be fairly found."

That is a good one, too, because are given power to find facts and then they go up on appeal, and some judges are known to doctor the facts, making it difficult to get a fair review. Those are the kinds of people I think we want, and I believe your remarks—and I was reading from your remarks and from the report—are right on point.

I would want to mention something else you said in your remarks. You quoted the Commission: "The Commission believes that it would be a tragic development if ideology became an increasingly important consideration in the future. To make ideology an issue in the confirmation process is to suggest that the legal process is and should be a political one. That is not only wrong as a matter of political science; it also serves to weaken public confidence in courts."

I am quoting: "Just as candidates should put aside their partisan political views when appointed to the bench, so too should they put aside ideology. To retain either is to betray dedication to the process of impartial judging. Men and women qualified by training and experience to be judges generally do not wish to and do not indulge in partisan or ideological approaches to their work."

Mr. Cutler, that is coming awfully close to what I think would be a good evaluation process. I take it you are concerned if we were to raise the profile of ideology in the process.

Mr. CUTLER. Well, I think it is your absolute right as Senators in confirmation to withhold or deny consent to the appointment on whatever you think is important. I do believe it is remarkable, despite the gauntlets that we ask nominees for the bench to run—the intrusiveness about the financial questions, the efforts to get

dirt on their personal conduct, and so forth—that we have as many very good, judicious, temperamentally of the right disposition on our Federal bench. It is really remarkable when you consider the level of the salaries that are paid and the intrusiveness of the vetting process today.

Senator SESSIONS. Thank you very much. Our time is short.

Chairman SCHUMER. Thank you.

Mr. Kyl?

Senator KYL. Thank you, Mr. Chairman. I appreciate your courtesies to me. I thank both of these witnesses. I compliment you both on your testimony. I agree with both of you and I sense that both of you are in substantial agreement.

I would just close, Mr. Chairman, by noting that on one of your subsequent panels you have a very erudite professor who ideologically is not in sync with my ideological views, and yet has brought profound erudition to a subject on which I am very committed and has contributed significantly in a way that is consistent with my ideology. I have in mind Dr. Tribe. Professor Tribe and I probably wouldn't end up in the same area on the court on some issues, and yet I know at least on one issue we would be very much together.

So I just raise this to suggest that in trying to create these delicate balances we had better be a little careful because there are so many different kinds of issues that come before us, it is a little difficult for us as politicians, I think, to make those judgments in advance.

Thank you very much again for your courtesy.

Chairman SCHUMER. Thank you, and I appreciate moving along.

We are going to vote. We are going to start with the second panel, with Professor Tribe, and I will be back in 10 minutes to start that. We will do the two votes quickly. I want to thank Mr. Cutler and Mr. Gray for being here.

Thank you.

[The Subcommittee stood in recess from 11:45 a.m. to 12:13 p.m.]

Chairman SCHUMER. I want to thank the witnesses for indulging us. We have finished our votes and I think we can move right forward. I just have two little bits of housekeeping.

The first is unanimous consent to put Senator Grassley's statement in the record, without objection.

Second, just a question that I have been asked by some: what do we mean by ideology? I am sure some here will discuss it. What it means is your views on not just broadly that you would support the Constitution, but what is your view of privacy, what is your view of how broadly or narrowly the First or Second Amendments should be interpreted, what is your view of federalism and the amendments that relate to the relationship between the State and the Federal Government. And there is also, in my judgment, nothing wrong with asking about decided cases, such as *Roe* v. *Wade*, such as Lopez, such as so many of the others that have come up.

Again, I was sort of surprised at the defensive tone that some of my colleagues had here. To equate asking about ideology and then saying that would be a litmus test is a stretch, a far stretch. I am just wondering why they are so worried about ideology being brought up.

We will hear from, as I say, a wide variety of witnesses here who have different views on that issue. I am not going to read all the introductions at once, since there are so many of you, so I will wait and do each one at a time.

So our first witness is Professor Laurence Tribe. Professor Tribe is well-known here. He is presently the Ralph S. Tyler, Jr. Professor of Constitutional Law at Harvard Law School. He graduated summa cum laude from Harvard College, magna cum laude from Harvard Law School, was clerk for Justice Potter Stewart of the Supreme Court, and has authored many books, including *American Constitutional Law, Constitutional Choices, God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes our History*, not to mention many other scholarly articles. He has been the lead counsel in over 25 cases before the Supreme Court, including this past year *Bush* v. *Gore*. Other cases have included *AT&T* v. *Iowa Utilities Board*, *Baker* v. *General Motors*, *Vacco* v. *Quill*, and *Rust* v. *Sullivan*.

Mr. Tribe, thank you for coming today. I look forward to your testimony. Since we have a large panel, we have asked each witness to try and stay within 7 minutes, but it is such an important issue and your testimonies are all so good, I am not going to just shut you down at the end of that. Maybe after eight, I will.

Professor Tribe?

STATEMENT OF LAURENCE H. TRIBE, TYLER PROFESSOR OF CONSTITUTIONAL LAW, HARVARD LAW SCHOOL, CAMBRIDGE, MASSACHUSETTS

Mr. TRIBE. Thank you, Mr. Chairman. It is an honor to testify before this subcommittee. I won't repeat what is in my prepared statement. I assume it will be part of the record. In the few minutes that I have, I would like to touch on what I think are the highlights and I would like to begin with some observations arising out of the testimony this morning, hopefully to puncture a couple of balloons or myths.

First of all, I don't think anyone here, at least certainly not me, is suggesting that ideology, whatever it might mean, suddenly be injected into the process. I think you have been wise, Mr. Chairman, to stress that you are talking about surfacing and making a specific matter of inquiry out of something that is otherwise shadowy and in the closet and sub rosa that is ordinarily on everyone's mind, but not necessarily on everyone's lips, that is often an excuse for character assassination, for digging around for some irrelevant dirt about someone's personal past, when what you really object to is her view of federalism or the fact that he believes that everything in the Constitution is written down except States' rights, which can be protected even though they are not enumerated.

Secondly, this is not a matter of payback for what the Republican Senate may or may not have done to Clinton nominees. I saw that as an overwhelming subtext this morning. This has nothing to do with that. I think we would be here even if no one had any complaint about the way the Republicans treated the nominees.

I do want to say as an aside, because I just can't resist the illogic of what I have heard, the record of the Senate's confirmation of some 377 Clinton nominees tells you absolutely nothing. When

powerful Senators, members of this committee, say to other Democratic Senators you tell the White House they better not send us any liberals or they are dead, you can expect the group of people who come out of the White House to be moderates and to be easily confirmed and to be non-controversial, especially when we had a President who didn't make a very big deal of using the judiciary to advance his agenda.

I also want to say that when most of us refer to ideology, we are not talking about political philosophy or political views. I have spent 32 years as a law professor battling the claim of the critical legal studies people that law is just politics by another name. I don't believe it. I believe that there is such a thing as law and legal thought, and that it does make sense to ask what someone's approach to legal issues is, but not in terms of these ludicrous platitudes. If I, with all respect may say it: would you follow the law? Duh.

[Laughter.]

Mr. TRIBE. Will you upheld your oath? Of course. Do you believe in precedent? Yes, I have seen some. But a question like, how will you go about deciding which precedents should be overturned and which shouldn't, what approach do you think justified overturning *Plessy* and *Brown*, what would it take to make it justifiable to overrule *Roe* v. *Wade*, and when a nominee says, oops, I can't talk about that because that might have something to do with what I will do as a judge, it seems to me at that point you ought to really scratch your head and say, of course it would have something to do with what you would do as a judge; I wouldn't be asking you otherwise. But it doesn't follow that you compromise your independence or your integrity by sharing your thought process.

After all, the people who are now sitting on the Supreme Court are already on record as having voted on a lot of these issues. We don't say that fatally compromises their integrity; they had better recuse themselves next time an issue about *Roe* v. *Wade* comes along.

The next point I want to make is that paying attention to ideology does not mean quizzing people on specific cases or making up a litmus list of some kind of orthodoxy. In particular, I was interested in the litmus test that Senator McConnell put up in his prepared remarks on the board over there, the six-point list which he offered as an only slightly caricatured version of what he perceived as liberal orthodoxy.

I looked at it and I concluded it would certainly filter me out. I would flunk on at least three of them, on the First Amendment part, the Second Amendment part, and the racial quota part. I think the real litmus test that people like me flunk is the litmus test that most Republican Presidents have used, but have kept in their vest pocket, and have tried, not always with success—witness David Souter—to implement in their choice of Justices. And for this Committee to engage in unilateral disarmament and to say you can do it, but we can't, or at least we can't talk about it, is really insanity, it seems to me.

Now, let me turn just to a couple of other things. I think it should be clear that we are not talking about anything new. The structure and the history of the Constitution, as I think you have

emphasized and as Senator Feingold emphasized, contemplates a double-barreled check on the powers of the politically unaccountable third branch of Government; that is, a check through the President with his power to nominate judges and through the Senate with the power to advise and consent or to withhold its consent.

The Senate's role in that process has historically, from the Framing, been a proactive role, not limited to checking intellect and integrity. In fact, in the Constitutional Convention of 1787, the power of appointment was nearly given to the Senate, appointment of Supreme Court Justices, until the more practically minded of the Framers recognized that to give a hydra-headed body like the Senate the requirement of agreeing on a first choice would be impractical. So that was given to the President, but the Senate was not reduced to a potted plant. The Senate was to have an active role in advice and consent, and that active Senate role, despite myth to the contrary, has served the Nation well.

Mr. Chairman, you used the example, and I think it should be underscored, that our first President, George Washington, named John Rutledge to be Chief Justice. The Senate, for reasons that were fundamentally ideological, indeed more ideological in the political sense that I am advocating, rejected his nomination. The result was hardly a disaster. John Marshall, the great Chief Justice, was the one who took that seat.

I cannot resist saying something about the episode with Robert Bork. I think that the Right has succeeded in revising history on that matter. It has succeeded indeed in creating a word, to "Bork."

I will just go on for a moment, Senator.

Chairman SCHUMER. Please. That says that you still have 2 minutes left and I am willing to give each of the witnesses more than that.

Mr. TRIBE. OK, thanks.

The new word, to "Bork," which sort of means unfairly to attack through slander about character—that is not what happened to Robert Bork. One could agree or disagree with the way the Senate went, but ultimately the Senate rejected him because it thought that he didn't believe in privacy as an element of the Constitution. He believed in a Scalia-like way of reading the document. His views were what many Senators would have regarded as an unacceptable part of the spectrum, and they were right.

His post-rejection writings make clear he was even more conservative than the Senators who rejected him thought. The result was we got Justice Kennedy. He may not be a Justice Brennan, but he is not a Justice Scalia, and I think that helps balance the Court.

The other large point that I think I really want to make is how contextual all of this is. During the periods of our history when the President and Senate have been of largely one mind—Lyndon Johnson and the Senate he had for a period, and Reagan and part of what he had to work with—the Senate can afford to relax its independent role. It checks to see that certain qualifications of character and integrity and intellect are met, but it doesn't have to really worry about point of view.

But when the President has a powerful ideological program which is hardly that of the Senate, especially when he is put in power by a closely divided vote of a Court exercising its disdain for

democracy, a disdain of the very sort that it exercises when it invalidates one after another act of Congress, then vigilance is called for, and that is the final point I want to make.

It is simply not true that activism is a characteristic only of liberal courts. We now have the most activist Court, by any objective measure, like the number of acts of Congress invalidated per month, on average, in at least 55 years. And they don't just strike down these acts of Congress; they give them the back of their hand.

You have elaborate findings about the need to protect the elderly or the disabled or religious freedom, and the Court says it is not our view, it is just anecdotal. It is utterly contemptuous. Now, that is a kind of activism which does not square with my idea of what it means not to legislate from the bench, and it just shows how empty the platitudes are and how important it is to get beneath the platitudes.

Given a Court that undeferential to Congress, that willing that lightly to invalidate acts of Congress, to end an election, to upset democracy, it would be, I think, an abject abdication of the Senate's constitutional responsibility for it not to bring ideology, in the sense of legal point if view, very much to the surface, not as a litmus test but as a way of deciding will this nominee on the whole—and each Senator has to decide that for him or herself—endanger what I think the Constitution is all about. That I think is your role.

[The prepared statement of Mr. Tribe follows:]

[Additional material is being retained in the Committee files.]

STATEMENT OF LAURENCE H. TRIBE, TYLER PROFESSOR OF CONSTITUTIONAL LAW, HARVARD LAW SCHOOL*

I am honored to have been invited to appear before this Subcommittee of the Senate Judiciary Committee to shed whatever light I can on the extremely important, and hopefully not too timely, topic of the Senate's role in the consideration of presidential nominations to the Supreme Court of the United States. I say "hopefully not too timely" because I think it wise of the Senate, with such guidance as the Senate Judiciary Committee through the agency of this Subcommittee can provide, to focus its attention now—not when a vacancy arises or a name is put forward—on the criteria to be applied in the confirmation process, and particularly on the role of ideology in that process.

There is a difficult trade-off here, to be sure. In Washington, as elsewhere, the squeaky wheel gets the grease. Focusing meaningful attention on an issue before it becomes a problem, much less a crisis, is difficult in the best of circumstances. Doing so when the issue is as abstract and complex as that of confirmation criteria for Supreme Court justices is more difficult still. Yet waiting until the matter is upon us, complete with a name or a short list of names, with interest groups and spinmeisters formidably arrayed on both sides, assures that the discussion will resemble a shouting match more than a civil conversation, and that every remark will be filtered through agenda detectors tuned to the highest pitch. On balance, I believe that addressing the question of the Senate's proper role under a veil of ignorance—ignorance as to precisely when a vacancy will first arise, which of the sitting justices will be the first to depart, and which name or names will be brought forth by The White House—seems likeliest to lead to fruitful reflection on how to proceed when the veil is lifted and we are all confronted with the stark reality of specific names and all that they might portend for the republic.

It is understandable that, partly because of the seemingly abstract and speculative character of such a discussion in the absence of any actual nominee, and partly because the more immediate question actually facing the Senate Judiciary Committee is how best to evaluate a group of nominees already put forward by the President to fill various vacancies in the federal courts of appeals, this Subcommittee has chosen to cast its inquiry more broadly than a focus on Supreme Court nominations would indicate and has decided to include in its charge the ques-

*For identification purposes only.

tion of what role ideology should play in considering federal judicial nominations generally. For that reason, at the conclusion of my observations about my principal topic that of Supreme Court nominations I will offer a few thoughts about the broader question that is of interest to the Subcommittee. But because I want to preserve to the degree possible the distinct advantages of separating the general question of criteria from any particular nominee or set of nominees, I will carefully avoid saying anything about any pending nomination and will, until the end of my remarks, discuss only the matter of nominations to the Supreme Court.

When my book "*God Save This Honorable Court*" was published in 1985 defending an active role for the Senate in the appointment of Supreme Court Justices, the Court was delicately balanced, with liberals like William Brennan and Thurgood Marshall offsetting conservatives like William Rehnquist and Antonin Scalia. Yet, on the inevitable book tour, I found quite a few otherwise well informed people wondering why the composition of the Supreme Court was all that big a deal, and why it shouldn't suffice for the Senate simply to make sure that the President wasn't packing the Court with cronies and with mediocrities. Having satisfied itself of the professional qualifications and character of the President's nominee, some people wondered, why should the Senate be concerned with that nominee's philosophical leanings or ideological predispositions?

People seemed to view things differently when they were exposed to the historical background showing that the Framers contemplated a much more central role for the Senate in this process, and when they learned that it was mostly the unwieldiness of having a collective body like the Senate make the initial nomination that led the Framers, at the last minute in the drafting process, to entrust the nomination to the President and to leave the Senate with the task of deciding whether to confirm or reject; that, even in the final version of the Constitution as ratified in 1789, the Senate's task was not left wholly passive (deciding between a thumbs-up and a thumbs-down) but was cast as the role of giving its "advice and consent;" and that, with the exception of an uncharacteristic lull in the last century, the Senate has traditionally exercised its advice and consent function with respect to the Supreme Court in a lively and engaged manner, concerning itself not simply with the intellect and integrity of the nominee but with the nominee's overall approach to the task of judging, and often with the nominee's substantive views on the burning legal and constitutional issues of the day. Those who initially assumed the Senate need not concern itself with a nominee's ideology tended to view the matter in a new light when reminded that, both in the formative days of our nation's history, under presidents as early as George Washington, and in recent decades, there has been a venerable tradition in which the Senate has played anything but a deferential role on Supreme Court nominations.

All of that registered with people back in 1985, but it wasn't until the 1987 resignation of Lewis Powell and the confirmation battle later that year over Robert Bork that the concrete stakes in this otherwise abstract controversy came to life for the great majority of the American public. In retrospect, although one can lament the ways in which some interest groups and politicians—on both sides of the question, frankly—exaggerated the record bearing on Judge Bork's views and bearing on what kind of Supreme Court Justice he would have made, the fact is that his confirmation hearings represented an important education for large segments of the public on such fundamental matters as the meaning of the due process and liberty guarantees of the Fifth and Fourteenth Amendments to the Constitution, the relevance and limits of the Ninth Amendment's reference to unenumerated rights, the connection between various ways of approaching the Constitution's text and history and such particular unenumerated rights as personal privacy and reproductive freedom, the relationship between a tightly constrained and literalist reading of the Constitution in matters of personal rights and a more open-textured and fluid reading of the Constitution in matters bearing on state's rights, and a host of other topics of enduring significance.

For my own part, as one of the expert witnesses called to testify about Judge Bork's constitutional philosophy and about the consequences for the nation were he to gain an opportunity to implement that philosophy as a Supreme Court Justice, I make no apology for anything I said at the time. Knowing full well that my testimony would put me on the enemies' lists of some extremely powerful people with very long memories, I felt it my duty to testify to the truth as I understood it. I would do the same thing again today. When the Senate finally rejected the nomination of Robert Bork, many of his allies cried "foul" and have since practiced decades of payback politics. Indeed, they have even succeeded, with the aid of some revisionist history, in adding to the vocabulary the highly misleading new verb, "to Bork"—meaning, "to smear a nominee with distorted accusations about his or her record and views"—as though the predictions of the sort of justice Robert Bork

would have become were in some way misleading or otherwise unfair. But the truth, as Judge Bork's post-rejection writings made amply clear, was just as his critics had indicated. Unless being confirmed would have caused him to undergo a radical conversion—something on which the nation has a right not to gamble—his rejection, and the subsequent confirmation of Justice Kennedy in his stead, meant one less member on the far right wing of the Court and left Justice Scalia (later with Justice Thomas) holding down the starboard alone. The nation had held a referendum on the Borkian approach to reading the Constitution of the United States, and the Borkian approach had decisively lost. And, lest it be supposed that I review this history simply to reprise a political episode that was painful for all concerned, I should make plain that my purpose is altogether different. It is to remove the fangs from the verb "to Bork" and to restore some perspective, lest anyone be misled into beginning the debate over the Senate's proper role with the erroneous premise that the Senate should be less than proud of the last instance in which it rejected a Supreme Court nominee on ideological grounds.

Today, it takes very little effort to persuade any informed citizen that the identity of who serves on the Supreme Court of the United States matters enormously—matters not simply to the resolution of these large questions of how the Constitution is to be approached and how its multiple ambiguities are to be addressed, but as well in the disposition of the most mundane, and yet basic, questions of how we lead our lives as Americans. Whether laws enacted for the benefit of the elderly or the disabled are to be rendered virtually unenforceable in circumstances where the violator is a state agency and the victim cannot obtain meaningful redress without going to federal court; whether people stopped in their cars for minor offenses like failing to have a seatbelt properly attached to a child's car seat may be handcuffed and taken by force to the police station where they are arrested and booked and held overnight; whether police may use sense-enhancing technologies like special heat detectors to peer through the walls of our homes in order to detect the details of what we do there; whether, having recognized that everything we do in the privacy of our homes counts as an intimate detail when it comes to protecting us from various kinds of search and surveillance, judges will nonetheless continue to let state legislatures regulate the most intimate sexual details of what we do behind closed doors with those we love; whether government may forbid the kind of research that might prove essential to the prevention and cure of devastating degenerative diseases whenever that research uses stem cells or other tissues from embryos created in clinics for infertile couples—embryos that would otherwise be discarded without making such life-generating new knowledge possible; what kinds of campaign finance restrictions are to be permitted when the broad values of democracy seem pitted against the specific rights of individuals and corporations to use their wealth to purchase as much media time as money can buy; who is to be the next President of the United States—these are just some of the questions whose answers have come to turn on a single vote of a single Supreme Court Justice.

The battle that was fought over the nomination of Judge Bork to become Justice Bork was fought because the general approach to constitutional interpretation that he seemed to represent attracted him to some but frightened an even larger number. Most dramatic among the anticipated consequences of his confirmation would have been the addition of his vote and voice to the far right wing of the Court on such issues as reproductive freedom, which the Constitution of course never mentions in so many words. His confirmation, people came to recognize despite his avowals of open-mindedness on all such matters, would have meant the certain demise of *Roe* v. *Wade*, a decision whose most recent application, in last year's "partial birth abortion" case from Nebraska, was, after all these years, still 5 to 4—as are a large number of crucial decisions about personal privacy, gender discrimination, sexual orientation, race-based affirmative action, legislative apportionment, church-state separation, police behavior, and a host of other basic issues.

After the Supreme Court's highly controversial and I believe profoundly misguided performance last December in the case of *Bush* v. *Gore*—in which I should acknowledge I played a role as author of the briefs for Vice President Gore and as oral advocate in the first of the two Supreme Court arguments in the case—it's difficult to find anyone who any longer questions why it matters so much who serves on the Court. The significance of *Bush* v. *Gore* in this setting doesn't depend on anybody's prediction of who would have won the vote-count in Florida had the counting gone on without the Supreme Court's dramatic and sudden interruption on December 9, 2000, or of who would have been chosen the next President by Congress this January 6 if the Supreme Court had let the constitutional processes operate as designed and if competing electoral slates had been sent from Tallahassee, Florida to Washington, D.C. The great significance of the case is to underscore that, by a margin of a single vote, the branch of our government that is least politically account-

able-wisely and designedly so, when matters of individual and minority rights or of basic government structure are at stake—treated the American electorate and the electoral process with a disdain that a differently composed Court would have found unthinkable. So it was that, when push came to shove, and the Supreme Court's faith in democracy was tested, the Supreme Court blinked. It distrusted the people who were doing the counting, it distrusted the state judges, it distrusted the members of Congress to whom the dispute might have been thrown if it hadn't pulled down the curtain. And the Court could get away with it, partly because nobody in the House or Senate, to be brutally honest, relished the thought of discharging the constitutional responsibility of deciding which electoral votes to count and then facing his or her own constituents—and because the people were growing weary of the no longer very sexy or novel topic of dimpled ballots and hanging chads, and Christmas was just around the corner, and, after all, everyone knew that the election was basically too close to call anyway. Lost for some in all of that realism, I fear, was the high price our democracy paid for the convenience of a Court that was willing—no, not just willing, positively eager—to take those burdens from our shoulders and simply decree a result. Among the results is an unprecedented degree of political polarization in the Court's favorability rating with the public—a rating that now stands roughly twice as high among Republicans as among Democrats, surely an ominous gap for the one institution to which we look for action transcending politics.

This isn't the time or place to debate the details of *Bush* v. *Gore*, a subject about which I have written elsewhere; I stress the case because it shows at least as dramatically as any case possibly could just how much may depend on the composition of the Court; how basic are the questions that the Court at times decides by the closest possible margins; and how absurd are the pretensions and slogans of those who have for years gotten away with saying, and perhaps have deceived even themselves by saying, that the kinds of judges they want on the Court, the "restrained" rather than "activist" kinds of judges, the kinds of judges who don't "legislate from the bench," are the kinds exemplified by today's supposedly "conservative" wing of the Court, led by Chief Justice Rehnquist and supported in area after area by Justices O'Connor, Scalia, Kennedy, and Thomas. Those are, of course, the five justices who decided the presidential election of 2000. They are, as well, the five justices who have struck down one Act of Congress after another—invalidating federal legislation at a faster clip than has any other Supreme Court since before the New Deal—on the basis that the Court and the Court alone is entitled to decide what kinds of state action might threaten religious liberty, might discriminate invidiously against the elderly or the disabled, or might otherwise warrant action by Congress in the discharge of its solemn constitutional power under Section 5 of the Fourteenth Amendment to determine what legislation is necessary and appropriate to protect liberty and equality in America.

Some might be tempted, after watching the Court perform so poorly in the pit of presidential politics, and after witnessing it substitute its policy judgments for those of Congress in one legislative arena after another, to imagine that, if we could only wave a magic wand and remove all ideological considerations from judicial selection—both on the part of the President in making nominations and on the part of the Senate in the confirmation process—somehow the Olympian ideal of a federal judiciary once again above politics and beyond partisan reproach could be restored. For several reasons, that is a dangerous illusion. First, there's no way for the Senate to prevent the President from doing what Presidents from the beginning of the republic have asserted the right to do, and what some Presidents have done more successfully than others: pick nominees who will mirror the President's preferred approach to the Constitution's vast areas of ambiguity. Second, in dealing with those areas of ambiguity, there may or may not be any right answers, but there most assuredly are no unique or uncontroversial answers; invariably, in choosing one Supreme Court nominee rather than another, one is making a choice among those answers, and among the approaches that generate them. And third, with a Supreme Court that is already so dramatically tilted in a rightward direction, anything less than a concerted effort to set the balance straight would mean perpetuating the imbalance that gave us not only *Bush* v. *Gore* but the myriad decisions in the preceding half-dozen years in which the Court thumbed its nose at Congress and thus at the American people.

In an accompanying memorandum that I prepared for distribution this April to a number of members of the Senate, I explore in greater detail how these recent Supreme Court encroachments on congressional authority have come about and what they signify. For purposes of my statement today, suffice it to say that such encroachments are the antithesis of judicial restraint or modesty; that the justices who have engineered them are the most activist in our history; that holding them up as exemplars of jurists who would never dream of "legislating from the bench"

is, to put it mildly, an exercise in dramatic license; and that the judgments the Senate will have to make about the inclinations and proclivities of prospective members of the Supreme Court must be considerably more nuanced than the stereotypical slogans and bumper stickers about *activism* vs. *restraint*, and even *liberalism* vs. *conservatism*, can possibly accommodate.

Some scholars, including most prominently University of Chicago Law Professor Cass Sunstein, who will also be testifying before you at this hearing, have powerfully argued that an active, nondeferential, role for the Senate in evaluating Supreme Court nominees is called for, quite independent of *Bush* v. *Gore*, by the way in which the federal judiciary in general, and the Supreme Court in particular, have been systematically stacked over the past few decades in a particular ideological direction- a direction hostile, for example, to the enactment ofprotective congressional legislation under Section 5 of the Fourteenth Amendment, and hostile as well to other ostensibly "liberal" or "progressive" judicial positions, on topics ranging from privacy to affirmative action, from states' rights to law enforcement. For Professor Sunstein, who will of course speak most accurately and fully for himself, the active role the Senate ought to play is exactly as it would have been had *Bush* v. *Gore* never been decided.

Other scholars, most prominently Yale University Law Professor Bruce Ackerman, argue that *Bush* v. *Gore* has thrown the process of judicial appointment into what Professor Ackerman calls "constitutional disequilibrium," so that, instead of two independent structural checks on a necessarily unrepresentative and politically unaccountable Supreme Court, we are now down to just one. Because, in his view, the current Court must be acknowledged to have "mediated" the "President's relationship to the citizenry"—by helping put him in office by a 5 to 4 vote—"only the Senate retains a normal connection to the electorate," and this demands of that body, as Professor Ackerman sees it, that it shoulder an unusually heavy share of the burden of democratic control, by the people acting through the political branches, of the judicial branch to which we ordinarily look to hold the balance true. Translated into an operational prescription, the Ackerman position would recommend that the Senate simply refuse to confirm any new justices to the Court before President Bush, as Professor Ackerman puts it, "win[s] the 2004 election fair and square, without the Court's help." As a fallback, Professor Ackerman would urge the Senate to consider any nominations President Bush might make to the Court during his current term on their own merits, but without what Ackerman describes as "the deference accorded ordinary presidents."

Although I am intrigued by Professor Ackerman's suggestion, it seems to me the wrong way to go, either in its strongest form or in its fallback version. The strongest form would make sense, I think, only if we were convinced that the justices who voted with the majority in *Bush* v. *Gore* acted in a manner so corrupt and illegitimate, so devoid of legal justification, that one could say they essentially installed George W. Bush as president in a bloodless but lawless coup. But if we believed that, then the remedy of not letting the leaders of that coup profit from their own wrong of denying them the solace of like-minded successors as they depart the scene—would be far too mild. If we thought the Bush majority guilty of a coup, we should have to conclude that they were guilty of treason to the Constitution, and that they should be impeached, convicted, and removed from office.

Believing that what the *Bush* v. *Gore* majority did was gravely wrong but not that it amounted to a coup or indeed anything like it—believing that the majority justices acted not to install their favorite candidate but out of a misguided sense that the nation was in grave and imminent peril unless they stopped the election at once—one would have to look to the Ackerman fallback position. But all it tells us is something that I argued was the case anyway as early as 1985—that the Senate should not accord any special deference to nominations made by any President to the Supreme Court. Indeed, I go further than does Professor Sunstein in this respect. As I understand his position, he would have the Senate withhold such deference for reasons peculiar to the recent history of the nation and of appointments to the federal bench and especially to the Supreme Court over the past few decades. Had we not lived through a time of Republican Presidents insistent on, and adept at, naming justices who would carry on their ideological program in judicial form, sandwiching Democratic Presidents uninterested in, or inept at, naming justices similarly attuned to their substantive missions, Professor Sunstein would apparently urge that the Senate give the President his head in these matters and serve only in a backseat capacity, to prevent rogues and fools, more or less, from being elevated to the High Court.

In a world in which each position on the Supreme Court might be given to some idealized version of the wisest lawyer in the land—the most far-sighted and scholarly, the most capable of clearly explaining the Constitution's language and mission,

the most adept at generating consensus in support of originally unpopular positions that come to be seen as crucial to the defense of human rights—perhaps we could afford in normal times to accept a posture of Senatorial deference, with exceptions made in special historical periods of the sort some believe we have been living through. But if we ever lived in a world where such a universal paragon of justice could be imagined, and in which the kinds of issues resolved by Supreme Court Justices were not invariably contested, often bitterly so, between competing visions of the right, that day has long since passed.

Today, regardless of whether past Presidents have acted or failed to act so as to produce a Supreme Court bench leaning lopsidedly in a rightward direction, and regardless of whether a majority of the current Court has acted in such a way as to render the President whom it helped to elect less entitled to deference than usual in naming the successors of the Court's current members, the inescapable fact is that the President will name prospective justices about whom he knows a great deal more than the Senate can hope to learn -justices whose paper trail, if the President is skillful about it, will reveal much less to the Senate than the President thinks he knows. Given his allies and those to whom he owes his political victory, as well as those on whom he will need to depend for his re-election, the incumbent President, if those constituencies expect him to leave his mark and therefore theirs upon the Court, will try to name justices who will fulfill the agenda of those constituencies—in the case of President Bush, the agenda of the right—without seeming by their published statements or their records as jurists to be as committed to that agenda as the President will privately believe them to be. Presumably, the incumbent President will look for such nominees among the ranks of Hispanic jurists, or women, or both, in order to distract the opposition and make resistance more painful. And certainly this President, like any other in modern times, will select nominees who have already mastered or can be coached in the none too difficult game of answering questions thoughtfully and without overt deception but in ways calculated to offend no-one and reveal nothing.

In this circumstance, to say that the burden is on those who hold the power of advice and consent to show that there is something disqualifying about the nominee, that there is a smoking gun in the record or a wildly intemperate publication in the bibliography or some other fatal flaw that can justify a rallying cry of opposition, is to guarantee that the President will have the Court of his dreams without the Senate playing any meaningful role whatsoever. Therefore, if the Senate's role is to be what the Framers contemplated, what history confirms, and what a sound appreciation for the realities of American politics demands, the burden must instead be on the nominee and, indeed, on the President. That burden must be to persuade each Senator—for, in the end, this is a duty each Senator must discharge in accord with his or her own conscience—that the nominee's experience, writings, speeches, decisions, and actions affirmatively demonstrate not only the exceptional intellect and wisdom and integrity that greatness as a judge demands but also the understanding of and commitment to those constitutional rights and values and ideals that the Senator regards as important for the republic to uphold.

On this standard, stealth nominees should have a particularly hard time winning confirmation. For proving on the basis of a blank slate the kinds of qualities that the Senate ought to demand, with a record that is unblemished because it is without content, ought to be exceedingly difficult. Testimony alone, however eloquent and reassuring, ought rarely to suffice where its genuineness is not confirmed by a history of action in accord with the beliefs professed. And testimony, in any event, is bound to be clouded by understandable reservations about compromising judicial independence by asking the nominee to commit himself or herself too specifically in advance to how he or she would vote on particular cases that might, in one variant or another, come before the Court. Interestingly, we do not regard sitting justices as having compromised their independence by having written about, and voted on, many of the issues they must confront year in and year out; the talk about compromising judicial independence by asking about such issues sometimes reflects unthinking reflex more than considered judgment. But on the assumption that old habits die hard, and that members of the Senate Judiciary Committee will continue to be rather easily cowed into backing away from asking probing questions about specific issues that might arise during the nominee's service on the Court, it should still be possible to formulate questions for any nominee, including tough follow-up questions, at a level of generality just high enough so that the easy retreat into "I'm sorry, Senator, I can't answer that question because the matter might come before me," will be unavailing. And, to the extent such slightly more general questions yield information too meager for informed judgment, the burden must be on the nominee to satisfy his or her interlocutors that the concern underlying the thwarted line of questioning is one that ought not to disturb the Senator. That satisfaction

can be provided only from a life lived in the law that exemplifies, rather than eschewing, a real engagement with problems of justice, with challenges of human rights, and with the practical realities of making law relevant to people's needs. When a nominee cannot provide that satisfaction -when the nominee is but a fancy resume in an empty suit or a vacant dress, perhaps adorned with a touching story of a hard-luck background or of ethnic roots—any Senator who takes his or her oath of office as seriously as I know, deep down, all of you do, should simply say, "No thanks, Mr. President. Send us another nominee."

What this adds up to is, of course, a substantial role for ideology in the consideration of any Supreme Court nominee. It would be naive to the point of foolhardiness to imagine that the President will be tone-deaf to signals of ideological compatibility or incompatibility with his view of the ideal Supreme Court justice; ideology will invariably matter to any President and must therefore matter to any Senator who is not willing simply to hand over to The White House his or her proxy for the discharge of the solemn duty to offer advise and consent.

As a postscript on the distinct subject of circuit court nominees, it seems worth noting that, although such nominees are of course strictly bound by Supreme Court precedents and remain subject to correction by that Court, and although there might therefore seem to be much less reason for the Senate to be ideologically vigilant than in the case of the Supreme Court, three factors militate in favor of at least a degree of ideological oversight even at the circuit court level.

First, well under 1% of the decisions of the circuit courts are actually reviewed by the Supreme Court, which avowedly declines to review even clearly erroneous decisions unless they present some special circumstance such as a circuit conflict. Especially if the circuit courts tend toward a homogeneity that mirrors the ideological complexion of the Supreme Court, that tribunal is exceedingly unlikely to use its discretionary power of review on certiorari to police lower federal courts that stray from the reservation in one direction or another; it will instead focus its firepower on bringing the state courts into line and resolving intolerable conflicts among the lower courts, state and federal.

Second, there are a great many gray areas in which Supreme Court precedents leave the circuit courts a wide berth within which to maneuver without straying into a danger zone wherein further review becomes a likely prospect. Even though no individual circuit court judge is very likely to use that elbow room in order to move the law significantly in one direction or another without a check from the Supreme Court, the overall balance and composition of the circuit court bench can have a considerable effect, in momentum if nothing else, on the options realistically open to the Supreme Court and thus to the country.

Third, in the past few decades, the circuit courts have increasingly served as a kind of "farm team" for Supreme Court nominations. On the Court that decided *Brown* v. *Board of Education* in 1954 there sat not a single justice who, prior to his appointment to the Supreme Court, had ever served in a judicial capacity. Governors, Senators, distinguished members of the bar, but no former judges. Today, however, rare is the nominee who has not previously served in a judicial capacity, most frequently on a federal circuit court. On the current Court, only the Chief Justice lacked prior judicial experience when he was first named a justice; and, of the other eight justices, all except Justice O'Connor, who had served as a state court judge, were serving on federal circuit courts when appointed to the Court. The reasons for this change are many; they include, most prominently, the growing recognition that ideology matters and that service on a lower court may be one way of detecting a prospective nominee's particular ideological leanings. Whatever the reasons, the reality has independent significance, for it means that any time the Senate confirms someone to serve on a circuit court, it may be making a record that, in the event the judge should later be nominated to the Supreme Court, will come back to haunt it. "But you had no trouble confirming Judge X to the court of appeals for the Y circuit," supporters of Supreme Court nominee X are likely to intone. Keeping that in mind will require the Senate to give fuller consideration to matters of ideology at the circuit court level than it otherwise might.

The primary ideological issue at the circuit court level, however, should probably remain the overall tilt of the federal bench rather than the particular leanings of any given nominee viewed in isolation. In a bench already tilted overwhelmingly in one direction—today, the right—a group of nominees whose ideological center of gravity is such as to exacerbate rather than correct that tilt should be a matter of concern to any Senator who does not regard the existing tilt as altogether healthy.

And one needn't be particularly liberal to have concerns about the existing tilt. Just as a liberal who recognizes that people who share his views might not have all the right answers ought to be distressed by a federal bench composed overwhelmingly of jurists reminiscent of William J. Brennan, Jr. or William O. Doug-

las—or even by a federal bench composed almost entirely of liberals and moderates and few conservatives—and just as such a liberal should doubt the wisdom, in confronting such a bench, of adding a group of judges who would essentially replicate that slant, so too a conservative who is humble enough to recognize that people who share her views might not have a lock on the truth should feel dismayed by a federal bench composed overwhelmingly of jurists in the mold of Antonin Scalia or Clarence Thomas—or even by a federal bench composed almost entirely of conservatives and moderates and few liberals—and ought to doubt the wisdom, in dealing with such a bench, of adding many more judges cut from that same cloth. The fundamental truth that ought to unite people across the ideological spectrum, and that only those who are far too sure of themselves to be comfortable in a democracy should find difficult to accept, is that the federal judiciary in general, and the Supreme Court in particular, ought in principle to reflect and represent a wide range of viewpoints and perspectives rather than being clustered toward any single point on the ideological spectrum.

Indeed, even those who feel utterly persuaded of the rightness of their own particular point of view should, in the end, recognize that their arguments can only be sharpened and strengthened by being tested against the strongest of opposing views. Liberals and conservatives alike can be lulled into sloppy and slothful smugness and self-satisfaction unless they are fairly matched on the bench by the worthiest of opponents. It may even be that the astonishing weakness and vulnerability of the Court's majority opinion in *Bush* v. *Gore*, and of the majority opinions in a number of the other democracy-defying decisions in whose mold it was cast, are functions in part of the uniquely narrow spectrum of views—narrower, I think, than at any other time in our history—covered by the membership of the current Court—a spectrum which, on most issues, essentially runs the gamut from A through C. On a Court with four justices distinctly on the right, two moderate conservatives, a conservative moderate, two moderates, and no liberals, it's easy for the dominant faction to grow lazy and to issue opinions that, preaching solely to the converted, ring hollow to a degree that ill serves both the Court as an institution and the legal system it is supposed to lead. It is thus in the vital interest of the nation as a whole, and not simply in the interest of those values that liberals and progressives hold dear, that the ideological imbalance of the current Supreme Court and of the federal bench as a whole not be permitted to persist, and that the Senate take ideology intelligently into account throughout the judicial confirmation process with a view to gradually redressing what all should come to see as a genuinely dangerous disequilibrium.

Chairman SCHUMER. Thank you, Professor Tribe, for excellent and truncated testimony. And I would recommend everybody read yours and all the other testimonies here.

Our next witness is Professor Stephen B. Presser. Professor Presser's primary post is the Raoul Berger Professor of Legal History at the Northwestern University School of Law. He received his undergraduate and law degrees from Harvard University and clerked on the United States Court of Appeals for the D.C. Circuit. He is a Fulbright Senior Scholar at the University College in London and serves as a professor in the Kellogg School of Business, where he teaches some of the Nation's leading executives in the Executive Master's of Business Administration Program. He has also published numerous books and articles on constitutional law.

Professor Presser, thank you.

STATEMENT OF STEPHEN B. PRESSER, RAOUL BERGER PROFESSOR OF LEGAL HISTORY, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, CHICAGO, ILLINOIS

Mr. PRESSER. Thank you, Mr. Chairman. It is an honor to be here and a delight to appear before my own home State Senator up there on the panel.

We are here really because of then-Governor Bush's campaign promise that he would appoint judges who would interpret the law rather than make it, and his statement that his judicial models

were Justices Scalia and Thomas. These two are the Justices most closely associated with the interpretive philosophy of effectuating the original understanding of the meaning of the Constitution, and these two are those who most consistently demonstrate the judicial philosophy Hamilton outlined in Federalist No. 78.

Now, there have been suggestions that more judges like Scalia and Thomas would be a danger to our Republic, that they have some sort of far-right-wing agenda, that they are undemocratic, that they are judicial activists who would, if multiplied, threaten our civil rights. Nothing, I think, could be further from the truth. There can be no danger posed by men and women who conceive of the judicial role as Hamilton conceived it, as implementing the will of the sovereign people.

President Bush more recently indicated, "Every judge I appoint will be a person who clearly understands the role of a judge is to interpret the law, not to legislate from the bench," as Senator Sessions and others pointed out a little bit earlier. Paraphrasing from the Federalist, Bush stated that "the courts exist to exercise not the will of men, but the judgment of law. My judicial nominees will know the difference."

If this is the ideology of President Bush's likely appointments, there is no terror in it. This is the traditional manner of interpreting the Constitution and laws, and it is all that Scalia and Thomas and most other Federal judges have had as a judicial philosophy. In this ideology, there is no danger unless one fears fidelity to the rule of law itself. And it should be emphasized, in our Republic the rule of law is nothing more than the formally expressed will of the people.

Hamilton wrote that it took a person of fit character to be a Federal judge, and that such people could not be found in great numbers. They had to have not only great knowledge of the law, but also to have the courage of their convictions and the ability to resist popular pressure that might lead them to ignore their constitutional duties.

This Senate, exercising its constitutional advise and consent function, must constantly be on guard against those who would seek to influence the judiciary for particular partisan purposes and who would seek to move the judiciary from its constitutional role as a neutral arbiter of the laws and the Constitution, the last point that Professor Tribe made, and I agree completely.

Unfortunately, many comments, even some made here, seem calculated politically to manipulate the judicial selection process. It is important to understand just how the Framers conceived of the senatorial role in advising and consenting on judicial nominees. There was an important role to play, but the Senate was not, has never been, and should not be co-nominators.

The Senate's role is discussed by Hamilton in Federalist No. 76, where he makes clear that in the appointments process the Senate should be concerned primarily with the virtue and honor of candidates. Hamilton states that the concurrence of the Senate is required in order to be an excellent check upon a spirit of favoritism in the President, and to prevent the appointment of unfit characters from state prejudice, from family connection, from personal attachment, or from a view to popularity.

Hamilton also notes that the scheme of Senate approval will reduce the chance that appointments will be made by the President simply on the basis of "his private inclinations and interests." No one has suggested that these are President Bush's motives, and it is impossible to understand how a pledge to appoint judges who will operate pursuant to a judicial philosophy that implements popular sovereignty and the rule of law could be the abuse of Presidential power Hamilton had in mind.

Now, of course, the Senate does have a very important role to play in ascertaining that those appointed to the judiciary are fit characters and persons of integrity, honor and virtue. But Hamilton's comments mean that the Senate should not use its own preferences for the production of particular results in the courts, as opposed to the following of proper procedures for determining the law as a litmus test for judicial appointments.

The Senate should not use partisan political ideology to select judges. Instead, the Senate should insist on proper judicial philosophy for nominees. Indeed, the genius of the separation of powers in America is that law is different from politics, and liberty and rights in this country are best protected by maintaining that separation. It is difficult, but it is enormously important, and Professor Tribe referred to the problem as well.

Really, the issue here is not left or right, radical or reactionary, or even liberal or conservative. The issue is the separation of powers under the Constitution and whether a nominee adheres to it or not. I urge this Subcommittee and the Senate to preserve what Judge Learned Hand called our common venture, the exercise of sovereignty by the American people and their right to make their own laws and Constitution. The philosophy of judging outlined by President Bush is no danger to that popular sovereignty. It is the only means of implementing it and the rule of law itself.

Thank you.

[The prepared statement of Mr. Presser follows:]

STEPHEN B. PRESSER, RAOUL BERGER PROFESSOR OF LEGAL HISTORY,
NORTHWESTERN UNIVERSITY SCHOOL OF LAW

My name is Stephen Presser, and I am the Raoul Berger Professor of legal History at Northwestern University School of Law. I hold a joint appointment with the Kellogg Graduate School of Management at Northwestern University, and I also teach in Northwestern's Weinberg College of Arts and Sciences, in the History Department. I have been teaching and writing about American legal history for the last twenty seven years, I am the senior author of a casebook on American Legal History and the coauthor of a casebook on Constitutional Law, as well as a book on Supreme Court Justice Samuel Chase and one on Constitutional Law theory. I have been privileged to testify before many committees of the House and Senate on Constitutional issues. I appear before you today, at the invitation of the Committee, to help you consider the role of ideology in the judicial selection process.

IDEOLOGY AND JUDICIAL PHILOSOPHY

we should first try to understand what is meant by "ideology" in the context of these hearings. The word has a variety of definitions, but I will adopt one simple one from the dictionary, "a systematic body of concepts, especially about human life or culture." [1] It might also be helpful, initially, to draw a distinction between what we might describe as an ideology of substance or results, and an ideology of process. An ideology of results might be an appropriate means of evaluating the elected offi-

[1] Merriam Webster's Collegiate Dictionary 575 (10th ed. 1996).

cials in a government, particularly those in the executive and the legislature, but an ideology of process would be a more important means of evaluating the behavior of the judiciary. We speak about such an ideology of process when we discuss what we more commonly refer to as "judicial philosophy," and it is that we are really concerned with in these hearings.

The question of the appropriate judicial philosophy for our country is one of the most crucial concerns for determining the fate of our republic, and thus I regard this hearing as among the most important I have been invited to attend. You have heard and will be hearing from a variety of witnesses from the academy, from practice, and from the political arena, and perhaps I can best serve you by sticking primarily with the perspective of the Framers, which is that I know best.

The Framers believed that it was important, from time to time, to return to first principles, and that is what we are doing this morning. The two basic principles of the American political system are the sovereignty of the people and the rule of law, and both figure intimately in the question of judicial philosophy. As I understand it, there is only one judicial philosophy of which the Framers' approved, and that is to be found in Federalist 78, the famous justification for judicial review written by Alexander Hamilton, in 1788.[2]

THE JUDICIAL PHILOSOPHY SUGGESTED IN THE FEDERALIST

Hamilton had to respond to critics of the proposed federal constitution who were concerned that it gave too powerful a role to federal judges, and that, in particular, federal judges might use their great power to impose their own view of what the law should be on the American people. The critics of the Constitution were particularly worried that federal judges might obliterate the authority of the state courts and the state governments, and replace the recently achieved independent role of the states as primary domestic lawmakers with an all-powerful central government.[3]

Hamilton responded to this criticism by emphasizing that it was not the job of judges to make law, that their role under the Constitution was simply to enforce the Constitution and laws as they were written, according to their original understanding. By doing so, Hamilton explained, federal judges would be acting as agents of the sovereign people themselves, and would do their part in implementing the rule of law. It was true that judges might sometimes be called upon to declare statutes invalid because of the dictates of the Constitution, that is, to declare, in the words we use today, that particular laws were "unconstitutional," but their role in implementing the will of the people as set forth in the Constitution required no less. The Constitution itself set certain limits on what legislatures could do, Hamilton explained, and when the legislatures exceeded those limits they ceased to act pursuant to the will of the people. Instead of being the agents of the people, as the Constitution dictated, in such circumstances the legislature would wrongly be exercising greater power than was authorized. It was then the job of the people's other agents, the Courts, to reign in the legislatures.[4]

When that kind of judicial review was done, Hamilton explained, the courts would not be exercising "will," but merely "judgment."[5] The only will that was important was the "will" of the sovereign people themselves as set forth in the Constitution, or laws passed pursuant to the Constitution, and the only job of judges was to enforce that expression of the will of the people. Hamilton's justification for judicial review, based on the sovereignty of the people, also implemented another important political ideal of the constitution's framers, the separation of powers. It was well understood, pursuant to the theories of the Baron de Montesquieu, as valid then as they are today, that liberty could not be preserved unless judges were barred from legislating, law-making was left to the legislature and the people themselves, and the executive did no more than carry out the directives of the legislature and the Constitution. As Hamilton wrote in Federalist 78, quoting Montesquieu's Spirit of Laws, "there is no liberty if the power of judging be not separated from the legislative and executive powers."[6]

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[2] James Madison, Alexander Hamilton, and John Jay, The Federalist Papers 436 (First published 1788, Penguin Books Reprint, 1987, Isaac Kramnick, editor)

[3] For a collection of the contemporary arguments for and against the Constitution, see generally Bernard Bailyn, editor, The Debate on the Constitution (New York: Library of America, 1993) (In two volumes).

[4] Federalist 78, supra note 2, at 437–440.

[5] Id., at 440.

[6] Id., at 437.

PRESIDENT BUSH'S PROPOSED JUDICIAL PHILOSOPHY

Considering what Hamilton had to say in Federalist 78, and considering what Montesquieu wrote, we are in a better position to understand the questions that are before this subcommittee today. We are here, basically, because of certain campaign promises that then Governor Bush made when he was running for the office he now holds. He explained that he wanted to appoint judges who would interpret the law rather than make it, and he further explained that his models for the type of judge he would appoint were the current Supreme Court Justices Antonin Scalia and Clarence Thomas.[7] These two are the Justices on the court who have been most closely associated with the interpretive philosophy of effectuating the original understanding of the meaning of the Constitution, and these two, it would seem, are those who come closest to most consistently demonstrating the judicial philosophy Hamilton limned in Federalist 78.[8]

There have been suggestions in the press, and it is likely that there will be testimony offered to you, that more judges like Scalia and Thomas would somehow represent a danger to our Republic, that they have some sort of "far right wing" agenda, that they are dangerous judicial activists who would, if multiplied, pose a fundamental danger to our civil rights as Americans. Nothing could be further from the truth. There can be no danger posed by men and women who conceive of the judicial role as Hamilton conceived it, as implementing the will of the sovereign people. George W. Bush summed up his perspective on judicial appointments when he indicated, "Every judge I appoint will be a person who clearly understands the role of a judge is to interpret the law, not to legislate from the bench. Paraphrasing from The Federalist, Bush stated that "the courts exist to exercise not the will of men, but the judgment of law. My judicial nominees will know the difference."[9]

If this is the judicial philosophy, or the ideology of President Bush's likely appointments, surely there is no terror in it. This is the traditional manner of interpreting the Constitution and laws, and it is all that Scalia and Thomas, and, indeed, many other federal judges past and present have had as a judicial philosophy. In this philosophy or ideology there is no danger, unless one fears fidelity to the rule of law itself. And, it should be emphasized, in our republic the rule of law is nothing more than the demonstrated will of the people. Hamilton stressed that it took a person of "fit character" to be a federal judge, and that such people could not be found in great numbers. They had to possess not only great knowledge of the law but also to possess the courage of their convictions and the ability to resist popular pressures that might lead them to ignore their Constitutional duties. Indeed, it is important for us to remember here that the Framers were well aware that judging in a manner consistent with the rights guaranteed by the constitution could be an unpopular course when passions were aroused, and thus Hamilton believed that steps were necessary to make federal judges as independent as possible. That's what lifetime good behavior tenure was designed to ensure, and that's why the provision against reducing judicial salaries was placed in the Constitution.

ADVISING AND CONSENTING WITH REGARD TO JUDICIAL NOMINEES

This hallowed legislative body, the United States Senate, exercising its Constitutional advice and consent function, must constantly be on guard against those who would seek to influence the judiciary for particular partisan purposes, and who would seek to move the judiciary from its constitutional role as a neutral arbiter of the laws and the Constitution. Unfortunately, many comments, even some made in these hearings, seem calculated politically to manipulate the judicial selection process, and seem designed to frustrate the appointment of judges who might refuse to follow a politically popular course when the Constitution and laws might provide otherwise.

It is important to understand just how the Framers conceived of the Senatorial role in advising and consenting on judicial nominees. This is discussed by Alexander Hamilton in Federalist 76, where he indicates that the scheme of delegated power under the constitution rests upon the implication "that there is a portion of virtue

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[7] See, e.g. David L. Greene and Thomas Healy, "Bush Sends Judge List to the Senate," Baltimore Sun, May 10, 2001, p. 1A (Indicating that the judges the President "admires most" are Antonin Scalia and Clarence Thomas.)

[8] For Scalia's statement of his judicial philosophy, see Antonin Scalia, A Matter of Interpretation (Princeton University Press, 1997), and for Thomas's judicial philosophy see Scott Douglas Gerber, First Principles: The Jurisprudence of Clarence Thomas (New York University Press, 1999).

[9] Volume 37, Number 19, Public Papers of the Presidents (Remarks of President George W. Bush Announcing Nominations for the Federal Judiciary, May 14, 2001).

and honor among mankind which may be a reasonable foundation of confidence" in public officials.[10] Making even clearer that in the appointments process the Senate should be concerned primarily with the virtue and honor of candidates, Hamilton explicitly indicates that the concurrence of the Senate is required for appointments under the Constitution in order to be "an excellent check upon a spirit of favoritism in the President, and to tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." [11]

Hamilton also notes that the scheme of Senate approval will reduce the chance that appointments will be made by the President simply on the basis of "his private inclinations and interests." [12] As far as I know no one has suggested that these are President Bush's motives, and I find it impossible to understand how a pledge to appoint judges who will operate pursuant to a judicial philosophy that implements popular sovereignty and the rule of law could be the abuse of Presidential power Hamilton had in mind. Indeed, judges faithful to the Constitution and laws, of a kind that President Bush proposes, are the possessors of the kind of wisdom, honor and integrity Hamilton thought crucial in nominees.

The Senate has a role to play in ascertaining that those appointed to the judiciary are "fit characters," and persons of integrity, honor, and virtue. But if Hamilton's comments in Federalists 76 and 78 mean anything, they mean that the Senate should not use its own partisan political preferences for the production of particular results in the courts, as opposed to the following of proper procedures for determining the law, as a litmus test for judicial appointments. The Senate should not use partisan political ideology to select judges, instead the Senate should insist on proper judicial philosophy for nominees. Indeed, the genius of the separation of powers in America, I have come to understand over three decades of practicing and teaching law, is that law is supposed to be different from politics, and liberty and rights in this country are best protected by maintaining that separation.

It worries me, then, when I read, in the press, suggestions that the Senate should be on its guard against Bush's judicial nominees because they are "right wing ideologues" or "judicial activists" who would present a danger to the enforcement of our precious constitutional heritage, or our civil rights.[13] It is common for Democrats to accuse Republicans of being tools of the "far right," and for Republicans to regard Democrats as "left wing" extremists, but these political terms of excoriation obscure rather than illuminate what is at stake when judicial appointments are being discussed.

Alas, even though some Senators have tried to suggest that what they want to see is "moderates" appointed as judges, I don't think even that term is useful here.[14] The idea of judicial "moderates" is not merely obfuscatory because in politics the "moderates" are always you or the people you agree with, while your opponents are always "extremists." The real problem is that judicial "moderation" in implementing the will of the people may not be a virtue. The issue here is not left or right, radical or reactionary, or even liberal or conservative, the issue is the separation of powers under the Constitution, and whether a nominee adheres to it or not. One who believes in adherence to the constitution, is of course, in a sense a conservative, since he or she is conserving constitutional values. Still, one who conserves constitutional values and the separation of powers, as Montesquieu pointed out, is also a liberal because he or she is preserving the liberty that can only exist where judges do not legislate.

There is Nothing to Fear from the President's Judicial Philosophy

It cannot be denied that there are substantive elements involved in the current struggle over judicial appointments. We all understand, I think, that there is a partisan divide over issues that could well be described as ideological, even if the proper judicial philosophy should not be a subject of partisan rancor. The fear of those who now seek to block President Bush's appointments is that if he is permitted to

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[10] Federalist 76, in Madison, Hamilton, and Jay, supra note 2, at 431.

[11] " Id., at 430.

[12] Ibid.

[13] Even my friend and fellow-witness at this hearing, University of Chicago Law Professor Cass Sunstein, has been quoted as stating that "There is a danger the federal judiciary could be dominated by right-wing ideologues." M.E. Sprengelmeyer, "Judge Nominee Called Extremist," Rocky Mountain News, May 10, 2001, page 24A.

[14] For example, the Chair of this subcommittee, Senator Schumer, has been quoted as stating, "Judges [nominated by the President] will have to be moderate." See, e.g., Ron Fourier, "Switch Tarnishes Bush's Image," Chattanooga Times/ Chattanooga Free Press, May 25, 2001, pg. A1 (AP Wire Story).

nominate judges of a philosophical bent close to those of Thomas and Scalia, they will participate in decisions that will bar affirmative action, interfere with the separation of church and state, and outlaw abortion. I understand those fears, but I do not share them for two reasons. First, I think that Thomas and Scalia's perspective on these issues is in accord with the original understanding of the constitution, and, second, I think that any new judicial appointments on the lower federal courts, or even on the United States Supreme Court, would be unlikely significantly to alter the law regarding these topics.

With-regard to the first point, Thomas and Scalia have indicated what appears to be a belief in a color-blind constitution, an understanding that any governmental discrimination on the basis of race ought to be prohibited. This, I think, is the perspective of Dr. Martin Luther King, who believed that we should judge persons by the "content of their character," and not "the color of their skin," [15] and, indeed, that was the goal of the Fourteenth Amendment itself. The Fourteenth Amendment after all, is couched in terms of "equal protection of the laws" not special advantage. This is not a radical or reactionary perspective, it is simple equality, or, perhaps, "Simple Justice." [16]

Thomas and Scalia have been reluctant to follow some of their brethren in broadly construing the establishment clause to bar all official involvement with religion, as they did, for example, when they dissented from a 1992 ruling that barred non-sectarian prayer at a middle school graduations [17] and from a more recent ruling regarding student prayer at a high school football game.[18] In doing so, of course, Thomas and Scalia were merely following centuries of American tradition, which emphasized the role of the sacred in undergirding American government and life. More importantly, they were emphasizing that in matters of religion, the Constitutional scheme barred the federal government from establishing a national sect, but left the state and local governments free to promote the policies they deemed proper.

This was the same perspective that animated and animates Scalia and Thomas's positions on the issue of abortion. They believe that this is not a question that the federal constitution addresses, and that the matter is best left in the hands of state governments, where the Constitution originally placed it.[19]

This last set of concerns may also help us understand what causes the anxiety over the President's potential nominees. For most of the past sixty-four years there has been a tendency on the part of the federal government to extend its regulatory reach, and for the federal courts to support such expanded federal power. We have seen, in recent years, some signs of willingness on the part of the Supreme Court to once again remind us that the powers of the federal government are limited and enumerated, and to manifest this willingness by declaring some federal statutes unconstitutional on the grounds that they exercise powers not granted to Congress.[20] Because I believe that the original constitutional scheme was to make the state and local governments the primary exercisers of legislative power I don't find this worrisome, but those who believe that the federal government ought to be the exclusive guarantor of our rights might disagree. I can't sympathize with that view, because I believe, as the Framers did, that the most important right of the people is to legislate for themselves, and I believe that this is best done by the governments closest to the people, except in matters of clearly national concern.

This right of the people to legislate for themselves, is, of course, the same thing that is involved in the Constitution's mandating of the separation of powers, and in the wish of President Bush that judges not-legislate. But to return to the reasons not to fear the Bush nominees. Even if the President were to be successful in getting through the Senate precisely those nominees of his choosing, and the nominees most committed to the original understanding and the belief that judges should not legislate, it is by no means clear that any, much less all of the Constitutional principles said to be endangered would be overturned.

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[15] The famous words are from Dr. King's "I have a Dream" speech, delivered at the Lincoln Memorial, in Washington, on August 28, 1963. See, e.g., Deborah Gillan Straub, African American Voices 211 (1996).

[16] See, e.g., Richard Kluger, Simple Justice: The History of *Brown* v. *Board of Education* and Black America's Struggle for Equality (Random House, paperback edition, 1977).

[17] *Lee* v. *Weisman*, 505 U.S. 577 (1992).

[18] *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290 (2000).

[19] See, e.g. *Planned Parenthood* c. *Casey*, 505 U.S. 833, 1002 (Scalia, J., dissenting) ("We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.")

[20] See, e.g. *U.S.* v. *Lopez*, 514 U.S. 549 (1994) (Holding unconstitutional the Federal Gun-Free School Zones Act, on the grounds that it was unauthorized by the Constitution's commerce clause), *U.S.* v. *Morrison*, 529 U.S. 598 (2000) (Holding, inter alia, that portions of the federal Violence Against Women Act failed to pass constitutional muster under the commerce clause).

The first point that needs to be made in this regard is that predictions of what people will do when they ascend the bench are notoriously inaccurate. President Madison appointed Joseph Story, thought to be a firm Jeffersonian, who turned out to be Marshall's staunchest ally on the Supreme Court bench, and, for all practical purposes, a committed nationalist.[21] President Eisenhower was frequently quoted as saying that he only made two mistakes as President and that they were both sitting on the United States Supreme Court. He was referring to his appointments to the court of William Brennan and Earl Warren, because they proceeded to decide cases in a manner with which he apparently thoroughly disagreed.[22] Most recently Justice Souter seems to have evolved a constitutional jurisprudence clearly at odds with the first President Bush's asserted preferences for judges would interpret the Constitution according to the original understanding. It is for this reason—the unpredictability of judicial performance—that the safest course is probably to focus on the competence, integrity, virtue and honor of nominees, since these seem to be qualities least subject to change over time, and least affected by becoming judges.

The second point regarding the lack of danger posed by Bush nominees to current Constitutional doctrines is related somewhat to the first, and is the difficulty of judges of any stripe in overruling established law. It is perhaps significant that the Supreme Court's 1992 ruling, in *Planned Parenthood* c. *Casey*,[23] which upheld *Roe* v. *Wade*,[24] the case finding in the 14th Amendment an unenumerated right under some circumstances for termination of pregnancies, was made by a Court that included 8 Republican appointments, and the five-person majority in that case were all Republican nominees. Indeed, most recently, the Supreme Court, which, at this writing has seven Republican nominees and two Justices nominated by a Democratic President, found that a state statute banning partial-birth abortion failed to pass Constitutional muster.[25] The empirical case that Republican appointees are a danger to the legality of abortion simply has not been made. Similarly composed Supreme Court majorities have upheld decisions involving affirmative action and applying the First Amendment strictly to separate state and local government from religion, though narrow majorities have also sought to give religious organizations the same free-exercise of speech rights as secular organizations, but this should hardly be cause for worry by the friends of free expression.

A final point to be made about the limited power of potential Bush nominees is that judges adhering to the original understanding, or those committed to exercising judgment rather than will, or those who know that it is the job of a judge to interpret rather than to make law, if placed on lower federal courts will follow the dictates of the United States Supreme Court. There is no more basic principle of our federal judicial system then that that binds the Courts of Appeals and the District Courts to follow the interpretations laid down by the Supreme Court. As long as that Court adheres to current doctrines regarding abortion, race, or religion, Bush nominees to the lower courts will follow them.

CONCLUSION: PRESERVING LEARNED HAND'S "COMMON VENTURE"

I do not suggest that the law or even the Constitution should not change over time, as the needs of the American people shift with economic, political, or social development. Such change, however, in our system, is supposed to come from legislatures or from Constitutional Amendment; and not through judges acting as legislators. As Learned Hand, perhaps the greatest judge never to sit on the Supreme Court, remarked, inveighing against the notion that members of that Court should make law:

> For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course, I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture.[26]

I urge this subcommittee and the Senate as a whole to preserve that "common venture," the exercise of sovereignty by the American people, and their right to

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[21] For Story's career, see, e.g., R. Kent Newmyer, Supreme Court Justice Joseph Story: Statesman of the Old Republic (Paperback ed., 1986).

[22] See, e.g. Lawrence Baum, The Supreme Court 41 (3d ed. 1989).

[23] 505 U.S. 833 (1992).

[24] 410 U.S. 113 (1973).

[25] *Stenberg* v. *Carhart*, 530 U.S. 914 (2000).

[26] Learned Hand, The Bill of Rights 73–74 (Harvard University Press, 1958).

make their own laws and Constitutions. The philosophy of judging outlined by President Bush is no danger to that popular sovereignty. It is the only means of implementing it and the rule of law itself.

Chairman SCHUMER. Thank you, Professor Presser.

Our next witness is Professor Cass Sunstein. He is also from the State of Illinois, so you might want to say hello to him, Senator Durbin.

Professor Sunstein is presently a member of the University of Chicago's Department of Political Science, as well as the law school. He graduated in 1975 from Harvard College, and in 1978 from Harvard Law School magna cum laude. He clerked for Justice Thurgood Marshall, and before joining the faculty of the University of Chicago Law School he served as an attorney-adviser in the Office of Legal Counsel in the U.S. Department of Justice.

He is the author of many articles and books, including *After the Rights Revolution: Reconceiving the Regulatory State, Constitutional Law, The Partial Constitution, Administrative Law and Regulatory Policy*, and the recently released *One Case at a Time: Judicial Minimalism on the Supreme Court.* He is now working on various projects involving the relationship between law and human behavior.

Professor Sunstein, thank you for coming and we look forward to your testimony.

STATEMENT OF CASS R. SUNSTEIN, KARL N. LLEWELLYN DISTINGUISHED SERVICE PROFESSOR OF JURISPRUDENCE, UNIVERSITY OF CHICAGO, LAW SCHOOL AND DEPARTMENT OF POLITICAL SCIENCE, CHICAGO, ILLINOIS

Mr. SUNSTEIN. Thank you, Mr. Chairman. It is an honor to be here, and I am going to try in these remarks to be as specific as I can because it is easy to get kind of tangled up in abstractions on this issue.

If we step back a bit, I think everybody agrees that ideology, in the sense of general approach or likely pattern of decisions, matters. There is no disagreement about that. If there was a nominee who thought that the Bill of Rights didn't apply to the States, or the Constitution didn't protect private property, or that segregation was acceptable at the hands of the State or Federal Government, almost everyone would agree that that nominee shouldn't be confirmed.

The President and the Senate are in accord on the importance of ideology. Republicans and Democrats agree with that. Political ideology, of course, doesn't matter. It doesn't matter who you voted for. The general approach to the Constitution and laws, of course, matters. That is not a disputed question.

Under current conditions, I suggest it is perfectly appropriate for independents, Republicans and Democrats to attempt to ensure a deferential judiciary that respects Congressional prerogatives. The current Federal judiciary, I suggest, is all too willing to invalidate Federal enactments. This is an issue that has gotten no attention thus far today, zero. It is the most important development within the last 10 years on the Federal judiciary; that is, we have a Supreme Court and lower Federal court judges who are willing to

limit Congressional power in a way unprecedented in the sense that we haven't seen it in the last 50 years.

We could deal a fair bit with numbers, and I think I am not going to give you numbers, but just to suggest that the Court has invalidated legislation that has commanded astonishing bipartisan support with the very recent past. The Violence Against Women Act, the Religious Freedom Restoration Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act—all of these in whole or in significant part have been invalidated by a Supreme Court and a lower Federal judiciary that is suffering on occasion from the vice of hubris.

My remarks will come in three parts. I will say a little bit about the constitutional role of the Senate, a little bit about the current Federal judiciary, and then a little bit about the appropriate Senate rule under current conditions; that is, conditions of the year 2001 as opposed to 1970.

With respect to the Constitution, the text, understood in its context, clearly contemplates an aggressive role for the Senate in looking at ideology, understood as general approach. federalism was a disputed issue at the time, of course, and the advice and consent function is no mere rubber stamp. The idea is that the Senate has a role in giving or denying consent, and also in advising, if it chooses and if the President chooses to listen, the President as well. This is not just a matter of paper; this is an important constitutional function.

With respect to the structure of the Constitution, there is a further point. There is all the difference in the world between the Senate's role in advising and consenting to Presidential appointments in the executive branch and Presidential appointments in the judicial branch.

I will suggest that I believe the Senate was entirely correct to confirm two honorable men, Attorney General Ashcroft and Solicitor General Olson, notwithstanding the controversy over their points of view. These are disputed issues and the President was entitled to have a wide berth there. I would submit the same thing with respect to other currently disputed Presidential nominees within the executive branch. President Bush is entitled to a great deal of room to maneuver.

The Federal judiciary is a whole different ball of wax, not least because the Federal judiciary often acts as an arbiter of controversies between Congress and the President, an issue which may come up again with respect to the area of campaign finance reform, where the Congress and the President may have a different view. Where the Federal judiciary has this arbitral role, the ordinary presumption of very strong deference just doesn't apply.

The original history of the Constitution strongly confirms this view. The word used by the Framers was "security." That is what the role of advice and consent was intended to give. Alexander Hamilton was a very great man. He was also probably the strongest defender of Presidential prerogatives at the time of the Framing. What he said is important, but it should be taken with many grains of salt.

In any case, the Nation's practice over the last 200-plus years has converged on a role for ideology. If President Clinton had nomi-

nated someone who believed that the Constitution doesn't protect private property or the Constitution guarantees a right to marry for homosexuals, there is no question there would have been an outcry. And to make those sorts of issues a basis for an outcry would have been entirely acceptable. Senator Hatch would have done that and he would have been within his constitutional domain to do that.

We now have a Federal judiciary that is very different from the Federal judiciary of 30 years ago. At that point, it would have been appropriate to complain about liberal judicial activism—a Supreme Court that had on it Justices Brennan, Marshall and Blackmun, all of whom were liberals; a lower Federal judiciary that had people in the mold of Brennan, Marshall and Blackmun.

These are in many ways distinguished people, Brennan, Marshall and Blackmun. I clerked for Justice Marshall. I disagree strongly with their view about the appropriate approach to the Supreme Court. I believe they were rightly criticized as liberal judicial activists.

Right now, we have a Supreme Court that has a heavy right wing, a heavy center, and no left at all. We don't have a single Justice who marches to the same tune as that set by Brennan, Marshall and Blackmun. Even for those who disagree with that tune or don't think it sounds quite right, this is a loss for the country.

The two characteristics of the Federal judiciary now, signaled maybe most prominently by the federalism cases, are, first, that it is quite willing to strike down Federal statutes, in some ways extraordinarily willing to do that, and it is willing to strike down Federal statutes from a particular direction; that is, the most prominent new departures by the Court, when it isn't just respecting old precedent, are departures in the direction set by, let's just call it the conservative right.

Indeed, I read the Republican Party platforms back to 1980 on the plane here and there is an eery resemblance between the directions being marked out by the most conservative Justices on our Supreme Court and our most conservative judges on the lower courts and the statements in the Republican Party platform.

It would be just too happy a coincidence if it turned out that the Republican Party platform perfectly tracked the original understanding of the Framers of the Constitution, and that coincidence I will just say in shorthand can't be vindicated by reference to history.

The re-molding of the Federal judiciary from the last 30 years has been deliberate and self-conscious. President Reagan was very concerned to ensure a restructured Federal judiciary and succeeded in that. He was self-conscious and effective.

President Clinton, by contrast, was concerned to work with the Republican Senate partly just because of his self-interest, and he appointed centrists, not liberals. Justice Breyer and Justice Ginsburg are extremely distinguished nominees. They are not at all like Brennan and Marshall or Blackmun. They have a very different approach to the law and the Constitution. It is an approach that I personally approve of.

I can't think of a single nominee by President Clinton to the lower Federal courts who genuinely counts as a liberal. He ap-

pointed centrists, not liberals. That is to his credit, I believe, but it involved a re-molding of the Federal judiciary.

Of course, it is right that the current Senate owes the President a large measure of respect and a measure of deference. But if we look at the trend lines own the Federal judiciary and what is likely to happen if President Bush is allowed to do whatever he wants, I don't think that Republicans are going to like that very much either.

Many Republicans don't like affirmative action programs and campaign finance reform. Most Republicans who don't like those things don't believe that the future of affirmative action programs and campaign finance reform should be set by the Federal judiciary.

Many Republicans believe that commercial advertising shouldn't be regulated by the state, that it is none of the state's business. Few Republicans believe that the Constitution of the United States forbids State legislatures from regulating commercial advertising. Justices Scalia and Thomas have signaled their strong desire to strike down affirmative action programs, campaign finance, and regulation of commercial advertising.

There is no question that their directions would draw into question, as they have just done, the Clean Water Act and the Endangered Species Act, and certain provisions at least of the Clean Air Act. This is objectionable not because the results are objectionable, but because it is an inappropriate role for the Supreme Court in our constitutional system.

Justice Scalia, I should say, my former colleague at the University of Chicago, is probably the best writer on the Court since Justice Jackson, and the Nation is much better off with his voice than without his voice. The same can be said for Justice Thomas, who has added a great deal to the Supreme Court partly because he has points of view and arguments, like Justice Scalia, that are very different from those of anyone else on the Court.

What is desirable is not a litmus test or an exclusion of people with particular points of view, but respect for intellectual diversity. And I fear that my fellow Illinoisan and friend, Professor Presser, is suggesting that his particular approach to the Constitution has a kind of unique claim to validity, as if the Federal judiciary should be monopolized by a particular interpretive approach. That is not the way a Federal judiciary operates in a democracy and it is appropriate for the Senate to assure that it doesn't happen.

To end, let me suggest that in this particular era we need a form of mutual accommodation between the Senate and the President to ensure not a litmus test for anyone in particular, but an appropriate degree of diversity, not racial or ethnic or based on gender, but intellectual diversity so that the Federal courts are not monopolizes by any particular interpretive approach.

We need, even more than that, a deferential judiciary that is humble and cautious and respectful of the prerogatives of the democratic branches of Government. The idea that the Supreme Court should interpret law and not make it is correct. That idea ought not to be used by those who believe that the Constitution, fairly interpreted, is a kind of weapon to be wielded against the elected branches of Government.

[The prepared statement of Mr. Sunstein follows:]

STATEMENT OF CASS R. SUNSTEIN, KARL N. LLEWELLYN DISTINGUISHED SERVICE PROFESSOR OF JURISPRUDENCE UNIVERSITY OF CHICAGO, LAW SCHOOL AND DEPARTMENT OF POLITICAL SCIENCE

Mr. Chairman and Members of the Subcommittee:

I am grateful to have the opportunity to appear before you today to discuss the issue whether "ideology" should matter in the process of appointing and confirming federal judges.

My basic conclusion is simple. "Ideology" should certainly matter, both for the President and for the Senate. At least this is so if "ideology" means the expected approach, and general patterns of votes, of a potential judge. Almost everyone would agree that the President should not nominate, and the Senate should not confirm, someone who thinks that the Constitution does not protect private property, or permits schools to be segregated on the basis of race, or allows government to suppress political dissent. Because of his unique constitutional position, the President's choices are certainly due a large measure of deference. But it is perfectly appropriate for the Senate to ask whether a nominee's general approach, or likely pattern of votes, fits within the acceptable range of views, given the current nature of the federal judiciary, and existing trends within the federal courts as a whole.

To offer somewhat more detail: In as era in which the federal judiciary is dominated by left-wing judges, interpreting the Constitution to fit with their own views of public policy, it would be perfectly appropriate for Senators to insist that the President appoint people who will have a more modest view of the judges' role in the constitutional order. In an era in which the federal judiciary has a good deal of diversity, is respectful of its own limitations, and has no particular "tilt," it would be appropriate for the Senate to allow the President to appoint the judges he prefers, so long as they are competent and have views that do not go beyond the pale. But in an era, like our own, in which the federal judiciary is showing too little respect for the prerogatives of Congress, an excessive willingness to intrude into democratic processes, and a tendency toward conservative judicial activism, it is fully appropriate for the Senate to try to assure more balance, and more moderation, within the federal courts.

My testimony will come in three parts. Part I briefly discusses the constitutional background. Part II discusses the nature of the federal judiciary. Part III discusses the appropriate posture, from the Senate, toward nominees by President Bush.

I. THE CONSTITUTIONAL BACKGROUND [1]

The Constitution fully contemplates an independent role for the Senate in the selection of Supreme Court Justices. That independent role certainly authorizes the Senate to consider the general approach, and likely pattern of votes, of potential judges.

Article II, Section 2 provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court." A first glance, these words assign two distinct roles to the Senate—an advisory role before the nomination has occurred and a reviewing function after the fact. The consent requirement, if the Senate takes it seriously, places pressure on the President to give weight to senatorial advice as well. At the same time, the advisory function makes consent more likely. The clause seems to envision a genuinely consultative relationship between the Senate and the President. It seems to create a deliberative process, jointly conducted, concerning the composition of the Court.

In the particular context of judicial appointments, there is an additional and highly compelling concern, one that stems from constitutional structure. It may be granted that the Senate ought generally to be deferential to Presidential nominations involving the operation of the executive branch. For the most part, executive branch nominees must work closely with or under the President. The President is entitled to insist that those nominees are people with whom he is comfortable, both personally and in terms of basic commitments and values. It is for this reason, among others, that the Senate's decisions to confirm Attorney General John Ashcroft and Solicitor General Theodore Olson seem to be entirely correct.

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[1] This section borrows heavily, and often verbatim, from David A Strauss and Cass R Sunstein, The Senate, the Constitution, and the Confirmation Process, 101 Yale LJ 1491 (1992). In order to promote readability, I have not included footnotes, which can be found in that essay, attached as an appendix to my testimony.

The case is quite different, however, when the President is appointing members of a third branch. The judiciary is supposed to be independent of the President, not allied with him. It hardly needs emphasis that the judiciary is not intended to work under the President. This point is of special importance in light of the fact that many of the Court's decisions resolve conflicts between Congress and the President. A Presidential monopoly on the appointment of Supreme Court Justices thus threatens to unsettle the constitutional plan of checks and balances.

History supports this view of the text and structure. The Convention had four basic options of where to vest the appointment power: it could have placed the power (1) in the President alone, (2) in Congress alone, (3) in the President with congressional advice and consent, or (4) in Congress with Presidential advice and consent. Some version of each of these options received serious consideration.

The ultimate decision to vest the appointment power in the President stemmed from a belief that he was uniquely capable of providing the requisite "responsibility." A single person would be distinctly accountable for his acts. At the same time, however, the Framers greatly feared a Presidential monopoly of the process. They worried that such a monopoly might lead to a lack of qualified and "diffused" appointees, and to patronage and corruption. The Framers also feared insufficient attentiveness to the interests of different groups affected by the Court. The compromise that emerged-the system of advice and consent-was designed to counteract all of these various fears.

A. THE EARLY AGREEMENT ON CONGRESSIONAL APPOINTMENT

It is important to understand that during almost all of the Convention, the Framers agreed that the Senate alone or the legislature as a whole would appoint the judges. The current institutional arrangement emerged in the last days of the process. On June 5, 1787, the standing provision required "that the national Judiciary be [chosen] by the National Legislature." James Wilson spoke against this provision and in favor of Presidential appointment. He claimed that "intrigue, partiality, and concealment" would result from legislative appointment, and that the President was uniquely "responsible." John Rutledge responded that he "was by no means disposed to grant so great a power to any single person. The-people will think we are leaning too much towards Monarchy."

James Madison agreed with Wilson's concerns about legislative "intrigue and partiality," but he "was not satisfied with referring the appointment to the Executive." Instead, he proposed to place the power of appointment in the Senate, "as numerous eno' to be confided in-as not so numerous as to be governed by the motives of the other branch; and as being sufficiently stable and independent to follow their deliberative judgments." Thus, on June 5, by a vote of nine to two, the Convention accepted the vesting of the appointment power in the Senate.

On June 13, Charles Pinckney and Roger Sherman tried to restore the original provision for appointment of the Supreme Court by the entire Congress. Madison renewed his argument and the motion was withdrawn.

The issue reemerged on July 18. Nathaniel Ghorum claimed that even the Senate was "too numerous, and too little personally responsible, to ensure a good choice." He suggested, for the first time, that the President should appoint the Justices, with the advice and consent of the Senate- following the model set by Massachusetts. Wilson responded that the President should be able to make appointments on his own, but that the Ghorum proposals were an acceptable second best. Martin and Sherman endorsed appointments by the Senate, arguing that the Senate would have greater information anda point of special relevance here-that "the Judges ought to be diffused," something that "would be more likely to be attended to by the 2d. branch, than by the Executive." Edmund Randolph echoed this view.

In the end, the Ghorum proposal was rejected by a vote of six to two. At that point, Ghorum suggested, as an alternative, that the President should nominate and appoint judges with the advice and consent of the Senate. On this the vote was evenly divided, four to four.

Madison then proposed Presidential nomination with an opportunity for Senate rejection, by a two-thirds vote, within a specified number of days. Changing his earlier position, Madison urged that the executive would be more likely "to select fit characters," and that "in case of any flagrant partiality or error, in the nomination, it might be fairly presumed that ⅔ of the 2d. branch would join in putting a negative on it." Pinckney spoke against this proposal, as did George Mason, who argued: " Appointment by the Executive is a dangerous prerogative. It might even give him an influence over the Judiciary department itself."

The motion was defeated by six to three. By the same vote, the earlier Madison proposal, in which the Senate would appoint the Justices, was accepted.

The issue next arose on August 23. Morris argued against the appointment of officers by the Senate, considering "the body as too numerous for the purpose; as subject to cabal; and as devoid of responsibility." But it was not until September 4 that the provision appeared in its current form. Morris made the only recorded pronouncements on the new arrangement and seemed to speak for the entire, now unanimous assembly. Morris said, "As the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security." The Convention accepted the provision with this understanding.

B. THE MEANING OF THE SHIFT TO PRESIDENTIAL APPOINTMENT WITH ADVICE AND CONSENT BY THE SENATE

There is no evidence of a general agreement that the President should have plenary power over the appointments process. On the contrary, the ultimate design mandated a strong role for the Senate in the form of the advice and consent function. In this way, it carried forward the major themes of the debates. With respect to the need for a Presidential role, the new system ensured "responsibility" and guarded against the risk of partiality in the Senate. With respect to resistance to absolute Presidential prerogative, the principal concerns included (1) a fear of "monarchy" in the form of exclusive Presidential appointment; (2) a concern for "deliberative judgments"; (3) a belief that "the Judges ought to be diffused," that is, diverse in terms of their basic commitments and alliances; (4) a fear of executive "influence over the Judiciary department itself"; and (5) a desire for the "security" that a senatorial role would provide. It is clear that these concerns reflected a belief that the Senate could consider what we would now call "ideology."

As several of the comments suggest, the Senate's role was to be a major one, allowing the Senate to be as intrusive as it chose. Even Hamilton, perhaps the strongest defender of Presidential power, emphasized that the President "was bound to submit the propriety of his choice to the discussion and determination of a different and independent body." Of course, the President retained the power to continue to offer nominees of his selection, even after an initial rejection. He could continue to name people at his discretion. Crucially, however, the Senate was granted the authority to continue to refuse to confirm. It also received the authority to "advise."

These simultaneous powers would bring about a healthy form of checks and balances, permitting each branch to counter the other. That system was part and parcel of general deliberation about Supreme Court membership. The Convention debates afford no basis for the view that the Senate's role was designed to be meager. On the contrary, they suggest a fully shared authority over the composition of the Court. That shared authority was to include all matters that the Senate deemed relevant, including the nominee's point of view.

C. THE EARLY PRACTICE

The practice of the Senate in the early days of the republic and thereafter attests to the same conclusion. George Washington's nomination of John Rutledge, then Chief Justice of South Carolina, as Chief Justice of the United States is a revealing case in point. Rutledge's challenge to the Jay Treaty, negotiated by Washington with Great Britain, played a pivotal role in the confirmation process. The Jay Treaty was challenged by the Republicans as a concession to Britain but approved by the Federalists as a way of keeping the peace. Rutledge attacked the treaty in a prominent speech in Charleston. The Federalists sought to block the Rutledge appointment on straightforwardly political grounds. Hamilton, a leader of the support for the Jay Treaty, led the opposition to Rutledge. The Senate ultimately rejected Rutledge in part for political reasons, by a vote of fourteen to ten.

Nor was the Rutledge rejection unique. In 1811, the Senate rejected Madison's appointment of Alexander Wolcott, partly on the basis of political considerations. In 1826, President Adams' appointment of Robert Trimble was nearly rejected on political grounds. The 1828 nomination of John Crittenden, a Whig, was ultimately prevented through postponement, and squarely on ideological grounds. Similar episodes occurred in the first half of the nineteenth century. In fact, during the nineteenth century, the Senate blocked one of every four nominees for the Court, frequently on political grounds.

The Senate has at times insisted on the "advice" segment of its constitutional mandate. In 1869, President Grant nominated Edwin Stanton after receiving a petition to that effect signed by a majority of the Senate and the House. In 1932, the Chair of the Judiciary Committee, George W. Norris, insisted on the appointment of a liberal Justice to replace Oliver Wendell Holmes. Greatly influenced by a meeting with Senator William Borah, President Hoover eventually appointed Benjamin

Cardozo to the Court. The Senator persuaded President Hoover to move Cardozo, then at the bottom of the President's list of preferred nominees, to the top.

More recently, the "ideology" of judges has played a role in the Senate's consideration of many Supreme Court nominees, including David Souter, Robert Bork, Clarence Thomas, Ruth Bader Ginsburg, Stephen Breyer, Anthony Kennedy, and others. Both Republicans and Democrats have considered the general approach and likely pattern of votes of Presidential nominees, including nominees for the lower courts. It would not be excessive to say that in the last twenty years, a bipartisan consensus has emerged on the relevance of "ideology," so much so that no Senator, and no outside observer, has seriously argued that it does not matter.

Constitutional text, history, and structure strongly suggest that the Senate is entitled to assume a substantial role. There are analogies to proposed legislation and treaties, and to the Presidential veto. No one thinks that the Senate must accept whatever bill or treaty the President suggests simply because it is a "competent" proposal; it would be odd indeed to claim that the President must sign every bill before looking closely at the merits. Under the Constitution, the role of the Senate in the confirmation process should be approached similarly.

II. The Contemporary Federal Judiciary

None of the foregoing discussion suggests that in all periods, the Senate should give careful consideration to the "ideology" of prospective judges. If the federal judiciary were appropriately diverse, and if it were showing appropriate respect for the prerogatives of the elected branches of government, there would be great reason to defer to presidential choices. If the Court were left-of-center, and pressing its own will in the guise of constitutional interpretation, the Senate should certainly respect any presidential efforts to redress the balance. But we are in the midst of a different and quite unusual situation. This is a period of conservative judicial activism, in which federal judges appear far from reluctant to reject the judgments of other branches of government. The Supreme Court is leading this unfortunate tendency, but the lower federal courts are entirely willing to strike down acts of Congress as well.

Because this is a period of conservative judicial activism, it is very different from other eras. For example, the period from 1935 to 1950 was generally one of judicial caution, in which the Court tended to uphold whatever the elected branches did. The period from 1958 to 1968 saw a great deal of left-wing judicial activism. We might even say that the Rehnquist Court is the conservative counterpart to the Warren Court, showing an even greater willingness to strike down legislation.

In terms of sheer competence, no one should doubt that the current Supreme Court is unusually distinguished. But there are two disturbing facts about the current Court and indeed the current federal judiciary as a whole. First, it does not defer to democratically elected branches. Second, it shows a distinctive ideological tilt. It is fair to say that it has a heavy right wing, a heavy center, but no left at all. Let me take these points in sequence.

The simplest fact about the Rehnquist Court is that *it has struck down more federal laws per year than any other Supreme Court in the last half century*. Indeed, the Rehnquist Court has been significantly more aggressive in invalidating federal statutes that the Warren Court itself. Because the Supreme Court struck down only one federal statute between the founding and 1856, there is a good chance that the Rehnquist Court is the all-time national champion, in terms of its sheer willingness to strike down federal statutes.[2] Many of the statutes invalidated by the Court have had strong bipartisan support within Congress, and in many of the relevant cases, there was a powerful argument on behalf of constitutionality.

Consider a few simple illustrations:

- The Rehnquist Court has reinvigorated the commerce clause as a serious limitation on congressional power, for the first time since the New Deal itself.[3] As a result, a number of existing federal statutes have been thrown into constitutional doubt.
- The Rehnquist Court has sharply limited congressional authority under section 5 of the fourteenth amendment, in the process striking down key provisions of the Americans With Disabilities Act, the Religious Freedom

[2] Of course the raw numbers do not tell us everything we have to know. Perhaps the Court was correct to invalidate a good deal of federal legislation; perhaps Congress has been, in the relevant period, enacting a number of unconstitutional statutes. To evaluate these claims, we need to go behind the numbers. But I believe a careful inspection of the cases shows that too much of the time, this Court is far from respectful of democratic prerogatives.

[3] *US* v. *Lopez*, 514 US 549 (1995); *US* v. *Morrison*, 120 S Ct 1740 (2000).

Restoration Act,[4] and the Violence Against Women Act,[5] all of which received bipartisan support. In fact section 5 of the fourteenth amendment has a narrower reach than at any time in the nation's history, because of the Rehnquist Court's decisions.

• The Rehnquist Court has imposed serious barriers to campaign finance legislation[6]—with Justices Scalia and Thomas suggesting that they would be prepared to strike down almost all legislation limiting campaign contributions and expenditures.[7] Many people do not believe that campaign finance legislation is a good idea. But many of those who would question it in principle (as I do) also believe that this is not a subject to be settled by federal judges.

• The Rehnquist Court has thrown affirmative action programs into extremely serious doubt,[8] raising the possibility that public employers, public schools, and public universities will not be able to operate such programs. Many people reasonably doubt the sense, wisdom, and fairness of affirmative action programs. But those who have these doubts usually do not believe that the issue should be resolved by federal judges, as it now threatens to be.

• The Rehnquist Court has given heightened protection to commercial advertising, to the point where advertising does not have much less constitutional protection than political dissent.[9]

• In many cases, the Rehnquist Court has interpreted regulatory statutes extremely narrowly, choosing the interpretation that gives as little as possible to victims of discrimination, pollution, and other misconduct.

On the basis of all this, there can be no doubt that this is a quite activist Court-activist in the sense that it does not have a modest conception of its role in the constitutional design.[10]

Now to the issue of "tilt." It is notable that the Supreme Court has moderates but no liberals—no one who stands as a jurisprudential successor to Justices William Brennan and Thurgood Marshall. The so-called "liberal wing" actually consists of two moderate, precedent-respecting Republicans (John Paul Stevens and David Souter) and two moderate Democrats who are respectful of precedent and represent centrist thinking (Ruth Bader Ginsburg and Stephen Breyer). The Court has no liberals in the sense that none of its members would follow in the path set by Brennan and Marshall.[11]

If we put the Court's activist inclinations together with its tilt, we reach a simple conclusion: The Court is all too willing to federal statutes, and the statutes that it is willing to strike down are usually those that diverge from a conservative orthodoxy. It is unsettling but true to find a considerable overlap between the general directions charted by the current Court and the general directions charted by Republican Party platforms over the last two decades. There can be no doubt that the transformation in the federal judiciary, produced over the last twenty years, has

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[4] *City of Boerne* v. *Flores*, 521 US 507 (1997).

[5] *US* v. *Morrison*, 120 S Ct 1740 (2000).

[6] *FEC* v. *National Conservative PAC*, 470 US 480 (1985).

[7] See Nixon v. Shrink Missouri Government PAC, 120 S Ct 897 (2000) (Thomas, J., joined by Scalia, J., dissenting).

[8] *Adarand Constructors* v. *Pena*, 515 US 200 (1995); *Metro Broadcasting* v. *FCC*, 497 US 547 (1990).

[9] See, e.g., 44 *Liquormart, Inc.* v. *Rhode Island*, 517 US 484 (1996).

[10] The idea of "judicial activism" is an unusually vexed one, above all because any claim that the judges are "activist" seems to depend on accepting a certain theory of legitimate interpretation. If originalism is the right approach to constitutional law, then Justice Scalia is no activist. If democracy-reinforcement is the right approach to interpretation, then Earl Warren was hardly an activist. Here is the problem: If we need to agree on a theory of interpretation in order to know whether judges are activist, discussion of the topic of "activism" will become extremely difficult and in a way pointless. A disagreement about whether judges are activist will really be a disagreement about how judges should be approaching the Constitution; and the notions of activism and restraint will have added nothing. Following Judge Richard Posner, I am using a neutral definition here. A court is activist when and to the extent that it is willing to strike down legislation or other acts and decisions by other branches of government. On this view, to call a court activist is not necessarily to condemn it. It is on this view that the Rehnquist Court counts as the most activist in the nation's history, simply because and to the extent that it has struck down more federal laws, on an annual basis, than of its predecessor courts. To be sure, this statistic does not tell us everything we need to know. But it is highly suggestive about current tendencies and trends.

[11] This is lamentable not because I believe that this is the correct path (in fact I strongly disagree with the path marked out by Justices Brennan and Marshall), but because a Court that lacks anyone committed to it is missing something important—just as a Court lacking the views of Scalia and Thomas would be missing something important.

been a product of political forces, and in particular of a self-conscious effort, by Republicans in the White House and the Senate, to ensure a judiciary of a certain stripe. This effort to transform the federal judiciary has been quite successful—in part because President Clinton, to his credit, generally made centrist appointments, on the Supreme Court and on the lower courts. In fact it is hard to think of any non-centrist appointment by President Clinton within his eight years in the White House. By contrast, President Bush and particularly President Reagan made a sustained effort to appoint young, conservative judges, many of whom continue to have a dominant influence on the lower courts, charting its basic directions.

III. The Senate's Current Role

If President Bush follows the path set by his predecessors, and if the Senate remains passive, what might the future look like' We could easily imagine a situation in which federal judges

- strike down affirmative action programs, perhaps eliminating such programs entirely;
- strike down campaign finance reform;
- invalidate portions of the Endangered Species Act and the Clean Water Act;
- reinvigorate a controversial understanding of the Second Amendment, so as to disable Congress and the states from enacting gun control legislation;
- elevate commercial advertising to the same basic status as political speech, thus preventing controls on commercials by tobacco companies (among others);
- further reduce congressional power under the commerce clause;
- generally limit democratic efforts to prevent disabled people, women and the elderly from various forms of discrimination;
- significantly extend the reach of the "takings" clause, thus limiting environmental and other regulatory legislation;
- ban Congress from allowing citizens to sue to ensure enforcement of the law;
- and much more.

From the constitutional point of view, what would be most troublesome about such a future would not be the results. It would be the large transfer of power from democratic branches to the federal judiciary. For people of varying political commitments, this transfer of power should be quite troublesome. The conservative attack on "liberal judicial activism" is now out of date, but it had a great deal of merit. Conservative judicial activism is not better.

Should anything be done about the situation? In an ideal world, neither Democrats and Republicans would have to think, most of the time, about the political convictions of judicial nominees. In such a world, both Republicans and Democrats would insist on high-quality judges who would decide cases based on legal grounds that could be accepted by people with diverse views. As I have suggested, rule by left-wing judges is as bad as rule by right-wing judges. In the 1970's, I believe that Republicans were right to attack undemocratic, overly ambitious rulings of the Warren Court. Yet by focusing so carefully on judicial appointments, recent officials have also produced undemocratic judiciary, one with far too little respect for the prerogatives of the elected branches.

If President Bush seeks judges with political missions, there is only one remedy. As a minimal step, the Senate should be prepared to block any effort by Mr. Bush to fill the courts with people of a particular ideological stripe. Of course the Senate has the power to refuse to consent to a presidential appointment; and the Senate should deny its consent to nominees who cannot demonstrate that they have a healthy respect for democratic prerogatives, and will refuse to participate in any general effort to engraft new constitutional limitations on congressional power. Justices Scalia and Thomas have been distinguished members of the Court, and their voices deserve to be heard. But a federal judiciary that follows their lead would make unacceptable inroads on democratic self government. The Senate should not permit this to happen.

Under the Constitution, the Senate also has power to provide "advice" to the president. As we have seen, the Constitution's framers intended the Senate's "advice and consent" role to provide security against what they greatly feared: an overreaching president willing to dominate the judiciary. The Senate should reclaim its advisory role,collaborating to ensure the creation of a modest, and properly balanced, federal judiciary. The Senate would be well within its rights to insist on a role in "advising" the President about the appropriate mix of federal judges, on the

lower courts as well as the Supreme Court. It would be most surprising if mutual agreeable accommodations could not be worked out.

A clarification: If the Court lacked anyone with Justice Scalia's views, and if it was tilted to the left, it would be appropriate to confirm someone like Justice Scalia, and perhaps even appropriate to insist on someone like Justice Scalia. A successful effort by Democrats, to create a left-wing judiciary with similar hubris, would properly meet with an aggressive Republican response.

CONCLUSION

In the context of the judiciary, the idea of "ideology" is a complicated one. Some people seem to think that they really know how to interpret the Constitution, and speak and write as if everyone who disagrees has an "ideology." But it is better to think that there are several reasonable approaches to interpreting the Constitution, and that in a democratic society, it is desirable to ensure a reasonable mix.

No one really doubts that "ideology," in terms of general approach, or patterns of likely votes, is relevant to the nomination and confirmation of federal judges. Everyone would consider certain views out of bounds. In the present circumstances, it is appropriate for the Senate to impose a high burden of proof on presidential nominees, in order to ensure that the federal judiciary has an appropriate mix of views, and does not accelerate the current trend toward an unacceptably aggressive role for federal judges in the constitutional order.

Chairman SCHUMER. Thank you, Professor Sunstein, for excellent testimony once again.

Our next witness is Professor Eugene Volokh. Professor Volokh now serves as professor of law at the University of California at Los Angeles. He teaches and has widely published on constitutional law, including religious freedom, civil rights, and freedom of speech. Professor Volokh received his undergraduate and law degrees from UCLA, and after clerking on the Ninth Circuit Court of Appeals he clerked for Associate Justice Sandra Day O'Connor on the Supreme Court of the United States.

Professor Volokh?

STATEMENT OF EUGENE VOLOKH, PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA AT LOS ANGELES, LOS ANGELES, CALIFORNIA

Mr. VOLOKH. Thank you very much. It is great pleasure to be here.

I wanted to make a few points, all of which converge on my basic point, which is that the Supreme Court as it is today is a fundamentally mainstream institution with mainstream views. And the conservatives, such as they are called, on the Supreme Court are also mainstream in their views, albeit, of course, as one might gather, somewhat toward the conservative side of the mainstream.

This, in fact, echoes something that I think Mr. Cutler had said earlier that, in fact, the Supreme Court today does exhibit the virtues of moderation that people been asking for. And let me try to support this with particular facts about the Court's recent record.

The Constitution is indeed a shield to be used by the people against the Government. At the same time, it is an empowering of the Government, it is a creation of the Government. There is no doubt that both the Federal Government and the State governments are properly the repositories of great power. There is equally no doubt the Constitution constrains them, and that the courts in our system of government enforce some of those constraints.

Those constraints come from the Bill of Rights and those constraints come from the structural provisions of the Constitution. It

is quite clear that the text of the Constitution was intended to impose some pretty serious structural constraints in the name of shielding the people against the Federal Government on the Federal Government. That is clear from the text, from the original meaning, and it has been pretty much a fundamental part of our constitutional structure.

The Supreme Court enforces both the Bill of Rights and the structural constraints. It enforces them against the Federal Government and against the State governments. In recent years, it has struck down at a somewhat higher rate Federal laws than before. I think at a somewhat lower rate has it struck down State courts than, say, the Warren Court had. But it is certainly supposed to enforce the constraints against both kinds of government.

It is interesting if you look at Federal statutes held unconstitutional by the Rehnquist Court, not including this term just because they weren't included in this last, there have been about 30. Fifteen of them have involved Bill of Rights protections, and the Supreme Court concluded, often in a way that cut across political lines, that certain Federal laws violated those rights.

Ten of the 15 involved the First Amendment. In fact, Justice Kennedy, for example, who is a conservative on the Court in many respects, has taken a rather broad view of free speech. Justice Breyer has taken a rather narrow view of free speech. Chief Justice Rehnquist and Justice O'Connor have also taken a fairly narrow view, whereas Justices Souter and Thomas have a somewhat broader view.

So in those areas I think we will all agree—we may disagree as to the particular decisions that were rendered, but I think we will all agree that it is quite proper for the Court to enforce the constitutional constraints against both the Federal Government and State governments. That is its role in our system.

Likewise, I would say that it is proper for the Court to enforce the indubitable structural constraints that the Constitution imposes on the Federal Government. Of the 30 cases, about 5 have involved separation of powers provisions, things like the Export-Import Clause and such, and about 10 of them have involved the question of substantive Federal power.

These are, in some respects, the most controversial ones. But, again, my first point is that the restraints on Federal power are part of the Constitution. They were clearly understood by the Framers. They, in fact, believed they were to be the most important part of the shield that the Constitution erects in order to protect against the Federal Government. And I think it would be improperly activist for the Court to ignore, to willfully set aside these clear constitutional constraints, although, of course, there can be debate about the proper definition of the scope of those constraints.

My second point is that if you look at the Court today, it is composed of two wings with questions of Federal power, setting aside the Bill of Rights provisions, but substantive power. One wing would say that the Federal Government has pretty much 100 percent of the power, and the other one would say the Government has pretty much 95 percent of the power.

Now, there have been some pretty prominent debates naturally in the course of litigation, especially cases that come before the Su-

preme Court, they are going to be at the cusp, at the boundary, at the place of debate just by the nature of the way the cases come before the Supreme Court. But the remaining 95 percent of the stuff is almost never debated. It is quite clear that the Federal Government has substantial powers over manufacture of goods, over commerce in goods, interstate and intrastate commerce in goods, much broader power than was generally understood throughout American history. But probably it is proper that it now has this broader power because, in fact, the scope of commerce has expanded so much.

The question is does it have all the power. Do those provisions of the Constitution that constrain Federal power, the enumerated powers provisions—are they, in fact, a nullity? Should they just be completed ignored or should they be given a certain degree of meaning?

Now, the way I have framed this issue, you probably have some sense of where I probably would come out on this, but I would quite acknowledge that the view of the four liberals on the Court of the 100-percent Federal power provision, I think, is a mainstream position. There are arguments in favor of that. The view of the other side is also eminently a mainstream position.

It does involve the striking down of certain Federal statutes, and that is not something that the Court should ever do lightly. Nonetheless, it seems to me that it is something that is well within the mainstream, well within the understanding of the Framers of the Constitution, as well as the understanding of American constitutional tradition.

Let me just mention a couple of specific points on this. First of all, if you look at the cases which involve the conclusion that the Federal Government just lacks certain enumerated powers—the *Lopez* case involving the Gun-Free School Zones Act, the *Morrison* case involving the Violence Against Women Act, the *City of Boerne* case involving the Religious Freedom Restoration Act—all of them involved actually really quite substantial recent expansions of the asserted claims of Federal power.

Historically, the Court has rarely struck down Congressional acts because Congress has generally been very careful to really pay attention to things that involve interstate commerce, or at least commerce. When you are talking about the regulation of non-commercial activity that has been traditionally part of the scope of State power rather than Federal power, it makes sense that the Court would look to the Constitution and conclude that there are certain restraints on the Federal Government there.

It is interesting, by the way, to note that one of those decisions, the *Boerne* decision, was, on the question of Federal powers, 7–0. Two Justices didn't reach it, and of the seven Justices, Justices Stevens and Ginsburg took the view that Congress had exceeded its powers.

Sovereign immunity decisions rest on somewhat different issues. I think that there are much more serious criticisms that could be leveled against them, as well as defenses. But they also come from a tradition of over 100 years of explicit judicial understanding and substantial Framing-era evidence that, rightly or wrongly -and by the way, I am no fan as a policy matter of sovereign immunity—

the Framers understood the state as retaining certain limited immunities against damages remedies under Federal statutes. So, again, these are very mainstream decisions.

Likewise, some of the decisions on the Bill of Rights side that Professor Sunstein criticizes are also very mainstream decisions. In fact, the notion that the Constitution has something to say about restrictions on speech and association, even if enacted in the name of campaign finance reform, the notion that it has something to say about commercial advertising, and the notion that it has something to say about affirmative action and racial preferences hardly is controversial or outside the mainstream notion.

On commercial advertising, Justice Stevens, alongside of Justice Thomas, have been serious advocates of the notion that freedom of speech includes the freedom of speech that is aimed to persuade people to buy products. On campaign finance speech restrictions and association restrictions, likewise there have been strong voices on both the left and the right in favor of the notion that the First Amendment does protect those rights; likewise with regard to racial preferences and affirmative action.

So it seems to me one can agree or disagree as a policy matter with some of the things the Court has been saying, but this is an eminently mainstream Court. It is mainstream in the sense that it takes seriously the notion of using the Constitution as a shield, a modest shield, but still as a shield against government power, both Federal and State.

It is mainstream in the fact that it acknowledges the Federal Government has tremendous powers, powers that are much greater than had been understood many times in the past, but at the same time powers that are in some measure limited. So it seems to me whatever one might say about this, this is a mainstream Court and the conservative wing of the Court is also firmly part of the mainstream.

[The prepared statement of Mr. Volokh follows:]

STATEMENT OF EUGENE VOLOKH, PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA, LOS ANGELES

Mr. Chairman, Senator Sessions, thank you for inviting me to address this very important topic. My name is Eugene Volokh, and I'm a professor of law at the University of California at Los Angeles.

The chief point I'd like to make today is that the Supreme Court's recent jurisprudence, including the views of the Court's more conservative members, has been firmly within the mainstream of American constitutional thought. One may agree or disagree with this jurisprudence, but one has to acknowledge that it's entirely mainstream.

The substantive federal power decisions (*United States* v. *Lopez*, 514 U.S. 549 (1995), *City of Boerne* v. *Lopez*, 521 U.S. 507 (1997), and *United States* v. *Morrison*, 529 U.S. 598 (2000)) are excellent examples of this sort of mainstream, eminently justifiable constitutional decisionmaking. The Constitution clearly sets up a federal government of enumerated powers-this is one of the fundamentals of James Madison's scheme. That's clear from the text of the document, and from all the contemporaneous historical evidence.

By very mildly reining in federal power, the Supreme Court has simply reaffirmed this fundamental constitutional principle. In fact, in one of these cases, Boerne, even Justices Stevens and Ginsburg agreed that the Congress had overreached its enumerated powers. And in *Jones* v. *United States*, 529 U.S. 848 (2000), all nine Justices (in an opinion written by Justice Ginsburg) took the view that applying a federal arson statute to "traditionally local criminal conduct" with no connection to commercial activity would at least pose a very serious constitutional problem.

Moreover, even in *Lopez* and *Morrison*, the debate was between the more liberal Justices' position that Congress has powers that are 100% unlimited (except by the Bill of Rights), and the more conservative Justices' position that Congress has powers that are 95% unlimited. Congress still has tremendous powers, even in areas of traditional state influence. The Court simply recognized that at some point even Congress's great powers go too far. The decisions are important, but they are mostly symbolic constraints. They do not seriously interfere with Congress's power to legislate.

Likewise, the state sovereign immunity decisions are part of a tradition that goes back a century and a half. There's a contentious historical debate about how the Constitution should be interpreted on this question; I don't know which side is right on this matter. But though as a policy matter I do not like sovereign immunity, it's clear to me that the Court's decisions follow a longstanding tradition, and are consistent with the great majority of the precedents.

Though the Rehnquist Court has not tried to transfigure the legal system by overturning state laws anywhere nearly as much as the Warren Court did, it has been striking down federal laws more often than past courts have. But this is largely because there are now more federal laws than in the past, especially in constitutionally sensitive areas.

Before the advent of the Internet, most speech restrictions (except in the specialized area of radio and television broadcasting) were imposed by states. Congress had never passed the Book Decency Act or the Movie Decency Act. But when Congress stepped in to restrict speech in the new nationwide (and international) medium of the Internet, naturally the Court stepped in, and imposed on Congress the same rules that it had long imposed on the states.

Until recent years, violent crime-except in the context of clearly interstate transactions-was largely seen as a state matter. But when Congress enacted laws such as the Gun-Free School Zones Act or the Violence Against Women Act, the Supreme Court had to step in and consider whether Congress had overreached the constitutional boundaries. That is the Court's job, and the further Congress tries to reach, the more likelihood there will be that there is indeed overreaching.

Chairman SCHUMER. Thank you, Professor Volokh.

Our next witness is Marcia Greenberger. She is the founder and co-president of the National Women's Law Center. She is a recognized expert on sex discrimination and the law, and has participated in the development of key legislative initiatives and litigation protecting women's rights, particularly in the areas of education, employment and health. She has been counsel in landmark litigation establishing new legal precedents for women and the enforcement of laws prohibiting discrimination in employment, education, athletics and health, and is the author of numerous published articles, including a chapter on key legal and policy issues in one of the first medical texts on women's health published in 1998.

She received her B.A. with honors in 1967 and her J.D. cum laude in 1970 from the University of Pennsylvania. In 1972, she started and became the director of the Women's Rights Project at the Center for Law and Social Policy, which became the National Women's Law Center in 1981.

Thank you very much, Ms. Greenberger, for coming.

STATEMENT OF MARCIA D. GREENBERGER, CO-PRESIDENT, NATIONAL WOMEN'S LAW CENTER, WASHINGTON, D.C.

Ms. GREENBERGER. Thank you, Senator Schumer. I appreciate the invitation of the Committee to testify today.

As you said, I come as co-president of the National Women's Law Center, which has since 1972 been integrally involved in the major efforts to secure and defend women's legal rights. With me is Judith Appelbaum, the Center's vice president and director of employment opportunities.

We cannot imagine a more important topic, of course, for the rights of women, their very health and safety, and for all people in this country. I have a fuller written statement that I would appreciate being submitted to the record.

Chairman SCHUMER. Without objection, it is in the record.

Ms. GREENBERGER. Thank you.

Well, in answering the question, should ideology matter, let me begin with illustrations of the real people behind some of those cases and principles that have been discussed earlier and the way those actual peoples' lives have been affected by the judicial philosophy of the Justices who have ruled on their fate.

Let me say, first of all, in recent years, often by 5–4 decisions and with vigorous dissents, we have seen the judicial philosophy of Justices take away key rights and the very authority of Congress to protect those rights for countless Americans.

Take Patricia Garrett, a registered nurse who was demoted by the hospital she worked for after missing work in order to receive radiation and chemotherapy treatments for breast cancer. Five Justices on the Supreme Court denied her the ability to hold her employer accountable under the Americans with Disabilities Act. These five Justices said Congress' effort in passing that Act to protect her and other disabled Americans like her was unconstitutional.

Or take Christy Brancala, a young woman who was sexually assaulted on her college campus. The same five-member majority of the Supreme Court, again with four Justices bitterly dissenting, denied her the right to sue her attackers, a right that Congress had wanted her to have under the Violence Against Women Act it passed.

The witness just preceding me talked about these positions as being well within the mainstream. Sometimes, of course, the mainstream is in the eye of the beholder, and if the courts are filled with judges and justices who take one particular position, perhaps that turns that position more into a mainstream position than one might have ever expected in the past.

But certainly for the women across the country who worked their hearts out to get the Violence Against Women Act passed, and their male allies in Congress and across the country who recognized the dramatic effect that violence against women has on women's ability to move freely across this land, to engage in work, to effect interstate commerce, and the mountains of legislative history that this Senate and the House amassed when it passed the Violence Against Women Act, they were shocked to find five Justices saying that Congress had no constitutional authority to make those findings, could not see the effect of violence against women and its dramatic connection to the Commerce Clause, let alone the kind of discrimination that women faced in courts in trying to assert their rights that many State attorneys general presented to the Supreme Court in support of the constitutionality of the Violence Against Women Act.

That same razor-slim majority has denied others, women and men, the ability to hold their employers accountable for age discrimination in the workplace, if they happen to work for a State agency. The judicial philosophy driving these five judges could be

extended, I fear, to limit the rights of our citizens under many other bedrock laws. And I will say again these are laws that women fought for, with men, laws like the Equal Pay Act and the Family Medical Leave Act, to name just two.

Individual rights, our most fundamental rights, are at risk. If the Supreme Court has a shift of even one key Justice and if lower courts are filled with judges who are antagonistic to *Roe* v. *Wade*, millions of women could see their health and even their lives placed at risk.

Clean air and clean water have been mentioned. I want to add to the list medical privacy. Statute after statute have been narrowed. Employment discrimination rights, education opportunities—these are all things that we thought Congress had passed, intending to protect all of us, and we have seen judges, and especially now also the Supreme Court narrowing those rights.

So does judicial philosophy and ideology on the courts matter? Of course it matters in the most fundamental way to each of us, to our children, no matter where we live all across the country.

As has been discussed, taking judicial philosophy account in judicial confirmations is nothing new. It is obviously nothing new in terms of the history of our country and the role of the Senate. It is certainly nothing new with respect to the President in his selection of those nominees.

We now, as has also been discussed, have a President who has said in a very straightforward way that he is looking at judicial philosophy in selecting his own nominees. Mr. Cutler described earlier a time that he would like to harken back to, a time when President Eisenhower did not look at judicial philosophy as the touchstone of his selections.

He, as some have pointed out, may have regretted the fact that he didn't look at judicial philosophy and give it more weight, since it has been described as his saying it was some of the biggest mistakes that he made. But that obviously also affected the role that the Senate chose to play, not the constitutional prerogatives that the Senate could have asserted if the times were different, as they so clearly are now.

I want to also refer to another scholar who had been mentioned earlier today, Professor Charles Black. He said the Constitution permits, if it does not compel, the taking of a second opinion from a body just as responsible to the electorate and just as close to the electorate as is the President. And this second opinion, as Professor Black and many others have shown, should be formed independently. As has also been discussed, the judiciary is our third and independent branch, independent from the executive and from the legislature, and it should not be the province of either one.

I want to make a couple of other points, given how critical the issues are today, and that is in the scrutiny that the Senate owes the American people for the nominees for lifetime appointment to the judicial branch of Government, it is of critical importance that any doubts that a Senator may harbor about a nominee's judicial philosophy in the critical areas that have been outlined today and many others must be resolved in favor, as Senator Byrd has said, of the interests of our country and its future.

No individual person has a right to a lifetime appointment to our bench, but the American people have a right to expect that their elected representatives will protect their constitutional and legal protections that have been at the core of what has made this country the democracy that it is.

As a part of the record, I have asked that a report that the National Women's Law Center presented, "The Supreme Court and Women's Rights: Fundamental Protections Hang in the Balance," be included in the record. That goes into much greater detail about some of these rights that are hanging in the balance.

I do want to just say a couple of other quick things about the scrutiny. When nominees come before the Senate, it is, as we have heard in most dramatic detail today, so clear that people mean very different things when they talk about not wanting to see an activist Court or respecting precedent.

We have heard generalized statements about being in the mainstream or following precedent, but we see just by the testimony that preceded me how differently individuals interpret those very general phrases. It is essential that in these hearings the judicial philosophy, as distinct from positions on specific cases to come before those judges if they are confirmed, be explored.

I want to say that in looking at and taking the measure of a nominee, some key lessons must be learned from the past. First, a nominee's previous writings and statements should be taken seriously. Confirmation conversions where nominees claim that they did not mean what they said or they said it just to be provocative should be viewed with strict and most skeptical scrutiny.

Moreover, if a nominee has little or no record on relevant issues, that nominee bears the burden of assuring the Senate that his or her judicial philosophy is acceptable. This is particularly important when, as now, the President has made clear that he is looking for judicial nominees who fit a particular mold.

The White House and the Justice Department have the opportunity and ability to thoroughly vet the judicial philosophy of the potential nominees, and it is important that the Senate do the same. Thus, a judicial nominee who appears in his or her confirmation hearing to be a blank slate is likely to have revealed him or herself to administration vettors to be nothing of the kind.

As one legal scholar put it, "No judge is a blank slate. Every judge has views on important issues before assuming the bench, and those preexisting beliefs influence decisions. Whether stated or not, the views still exist. Thus, a judicial candidate's refusal to answer questions does not communicate open-mindedness, just secrecy."

I hope that time does permit a review of some of the discussion of what happened in the judicial nomination and confirmation hearings of Judge Bork, and ultimately Clarence Thomas as well, and especially in the context of Clarence Thomas, where his very generalized answers about not having positions on key issues such as *Roe* v. *Wade* and coming to the Court with a completely open mind and having never even discussed *Roe* v. *Wade* at any point that he could remember, even though that decision had come down when he was in law school, played a very prominent role in his confirmation.

He assured this Senate he did not have an ideology to take to the Court, and 8 months after being on the Supreme Court voted to overturn *Roe* v. *Wade* and has repeatedly and consistently said that he thinks that *Roe* was wrongly decided. Reporters have since cited sources saying that in their work with Clarence Thomas to prepare for the confirmation hearings, he was directed to say nothing about his views on *Roe* v. *Wade*, lest if he were more open with the Senate it would have interfered with his ultimate confirmation.

It is essential that risks, in short, and the concerns of potential nominees be placed not at the feet of the American public to bear, but rather that the burden be on the nominee to assure the Senate that they belong and earn and deserve that lifetime appointment.

Thank you.

[The prepared statement of Ms. Greenberger follows:]

[Additional material is being retained in the Committee files.]

STATEMENT OF MARCIA D. GREENBERGER, CO-PRESIDENT, NATIONAL WOMEN'S LAW CENTER

My name is Marcia Greenberger, and I appreciate your invitation to testify today. I am Co-President of the National Women's Law Center, which since 1972 has been at the forefront of virtually every major effort to secure and defend women's legal rights. With me is Judith Appelbaum, the Center's Vice President and Director of Employment Opportunities.[1]

I. INTRODUCTION: WHY THE SENATE'S CONFIRMATION ROLE IS CRITICAL

The issue that is before the Subcommittee today is one that is of central importance to the American people. What is at stake is nothing less than the composition, for decades to come, of one of the three separate and equal branches of our government. While more public attention is generally focused on the process of selecting the occupants of the other two branches—through the Presidential and Congressional elections—the judiciary has at least as much impact on the lives of citizens, through its role in interpreting and applying the laws of the land that govern us, including the fundamental rights and liberties protected by the Constitution. Moreover, because members of the judicial branch are appointed with lifetime tenure, the scrutiny that they receive during the nomination and confirmation process is the only form of accountability for them that our system provides, short of the extreme—and extremely rare—remedy of impeachment. That is why the way in which the Senate carries out its constitutional role in the confirmation of judges is of such paramount importance of all Americans.

For women, and the fact for all Americans, over the last 30 years the federal courts have allowed important advances to be made in the elimination of barriers to equal opportunity for all. Through their interpretations of the equal protection and privacy guarantees of the Constitution and of federal statutes aimed at eradicating sex discrimination and arbitrary barriers to the advancement of women, minorities, the disabled and older Americans, the federal courts have given life to the protections our laws provide for important rights and liberties—including the right to equal opportunity in the workplace, in education, and indeed in all facets of society, as well as a woman's right to choose to terminate a pregnancy. The role of the Supreme Court in protecting women's rights, with some barely surviving by 5 to 4 margins, and the ways in which many hard-fought gains have been weakened by slim majorities of the Court in recent years, are the subject of a National Women's Law Center report entitle *The Supreme Court and Women's Rights: Fundamental Protections Hang in the Balance*, which is attached to this testimony and which I would like to submit for the record. This report documents in detail how a shift of even just one vote on the Court could turn back the clock for women's core legal rights.

While our report focuses on the Supreme Court, it important to recognize the enormous power that lower federal courts, especially the Courts of Appeals, also wield over these and other critical issues. The vast majority of cases in the federal system are never accepted for review by the Supreme Court, and the highest level

[1] I would also like to acknowledge the assistance of two Center legal fellows, Nicole Deddens and Susannah Voigt, in the preparation of this testimony.

of review available is a Court of Appeals.[2] Indeed, the number of cases heard by the high court has declined in recent years.[3] Moreover, while some have suggested that lower court nominations require less scrutiny because these courts are constrained by Supreme Court precedents, the Supreme Court's jurisprudence in many areas leaves a great deal of latitude for lower courts. For example, the Supreme Court's decision in *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992), adopted a highly subjective standard that allows states to impose restrictions on abortion as long as they do not place an "undue burden" on a woman who seeks to terminate her pregnancy. When is a burden "undue"? The Supreme Court gave little guidance, and some lower court judges decided that even substantial obstacles placed in a woman's path were not "undue. " A full eight years elapsed between the time the Supreme Court established the standard and the time it first reviewed any lower court's application of it in 2000, and countless women had their right to choose irrevocably lost by erroneous lower court rulings in the meantime. On other issues, some judges have gone so far as to disregard precedents of the Supreme Court altogether.[4]

Lower court appointments also take on particular significance in light of the current composition of many of those composition of many of those courts. A majority of the Courts of Appeals are comprised of majorities that reflect a conservative judicial philosophy. And the extreme views of some Circuits, especially the Fourth, on the fundamental legal issues of the day have been the subject of extensive commentary.[5] A tilt to the right has been exacerbated by the Senate's refusal to confirm an inordinately high number of qualified nominees—some 36 in all—to the Courts of Appeals during the last eight years, thus disrupting the balancing process that normally takes place over time as Administrations change. There are now over 30 open seats on the Courts of Appeals. If these seats are filled with conservatives who make it thought the Federalist Society screening process, and who fit the mold of Justices Scalia and Thomas (whom President Bush has cited as appropriate judicial role models), the overall ideological tilt of the federal judiciary will shift even further to the right, with serious repercussions for all those who look to the courts for the protection of civil rights, women's rights, individual liberties, and other fundamental values of our society. We will see even fewer of the splits among the Circuits that normally trigger Supreme Court review, and less of the kind of debate among different judicial perspectives within panels of Circuit judges that can affect the outcome of cases and the development of the country's jurisprudence.

Moreover, the very ability of Congress to protect the American people is on the line. When the courts take an unduly narrow view of the constitutional authority of Congress to pass legislation—as the Supreme Court has done, to cite just a few

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[2] While 54,088 cases were acted on in 1999 by the 12 Courts of Appeals, only 83 cases were argued before the Supreme Court in 1999. See, SUPREME COURT OF THE UNITED STATES, 2000 YEAR END REPORT ON THE FEDERAL JUDICIARY, <http://www.supremecourtus.gov/publicinfo/year-end/2000year-endreport.html>; JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2000 ANNUAL REPORT OF THE DIRECTOR, <http://www.uscourts.gov/judbus2000/contents.html>; See also, Edward A. Purcell, Jr. Reconsidering the Frankfurtian Paradigm: Reflections on Histories of Lower Federal Courts, 24 L. & SOC. INQUIRY 679, 722 (1999) (citing statistics that suggest that over 95% of decisions by the court of appeals are final); Ashutosh Bhagwat, Separate But Equal? The Supreme Court, The Lower Federal Courts, and the Nature of the "Judicial Power," 80 B.U.L.REV. 967, 984–5 (2000) (demonstrating that as a practical matter federal courts are not and have not been under the close supervision of the Supreme Court since "the threat of review by the Supreme Court is extremely limited, given practically and voluntarily adopted constraints on the Court's docket, and the huge volume of federal litigation ").

[3] See, e.g., Arthur D. Hellman, The Shrunken Docket of the Rehnquist Court, 1996 S. CT. REV. 403; David M. O'Brien, Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket, 13 J.L. & POL. 779, 807 (1997); ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES 71 (2001).

[4] See, e.g., *Hopwood* v. *State of Texas*, 78 F.3d 932 (1996), in which a panel of the Fifth Circuit, explicitly declining to follow the Supreme Court's ruling in *Regents of Univ. of Cal.* v. *Bakke*, 438.S. 265 (1978), held that race-based affirmative action can never be used to further diversity in institutions of higher education, id. at 944; *United States* v. *Dickerson*, 166 F.3d 667, 692 (4th Cir. 1999), rev'd 120 S.Ct. 2326 (2000) where the appeals court held that, contrary to 30 years of precedent, the Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), was not binding in federal courts. The Supreme Court subsequently reversed this decision by a 7–2 vote. *Dickerson* v. *United States*, 120 S.Ct. 2326 (2000).

[5] See e.g., Brooke A Masters, *Battle Brewing Over 4*th Circuit Nominees, The Washington Post, May 5, 2001, A1 ("Considered the nation's most conservative appeals court, the 4th Circuit has drawn national attention for its decisions limiting federal power, upholding death sentences and narrowing the rights of citizens to file environmental and civil rights law suits."); Associated Press, *Helms Set to Back Nominee*, Richmond Times-Dispatch, May 3, 2001, B4 (noting that the 4th Circuit is "the nation's most conservative appeals court").

examples, in striking down the civil rights remedy in the Violence Against Women Act,[6] invalidating the right of plaintiffs under the Americans with Disabilities Act[7] and the Age Discrimination in Employment Act[8] to hold state employers accountable for their discrimination, and striking down the Gun-Free School Zones Act[9]—they wipe away years of hard legislative effort, ignore what often amounts to "mountains" of legislative history,[10] substitute their judgment for that of Congress (prompting Justice Breyer, in one dissent, to protest, "The Congress of the United States is not a lower court"[11]). and, because such rulings are based on the Constitution, leave little opportunity for Congress to repair the damage. And while Congress can and does enact "restoration acts" to undo the damage when the Court misconstrues the language and intent of its statutes, as it has had to do repeatedly for Title VII of the Civil Rights Act (prohibiting discrimination in employment on the basis of race, sex, religion or national origin), Title IX of the Higher Education Amendments (prohibiting sex discrimination in education), as well as the laws prohibiting discrimination on the basis of race, national origin, age and disability, these legislative battles—as Members of this Committee know all too well—consumer enormous amounts of time and energy that could be better spent on moving forward a positive agenda for the American people.

For all of these reasons, with all that is at stake, the framers of the Constitution wisely lodged the responsibility to appoint federal judges not exclusively with the President, but with the Senate as well. And having had that heavy responsibility conferred on this body, each member of the Senate must carry out his or her "advise and consent" duty in a way that will protect and defend our most precious rights and principles. It is to that subject that I now turn.

II. The Senate's Role in Judicial Confirmations

A. the senate's co-equal, independent role

The "advise and consent" language of the Constitution itself, and the history of the framers' adoption of this formulation, make it clear that the Constitution creates and independent role and set of responsibilities for the Senate in the confirmation process.[12] And, as in so many other ways, the framers of the Constitution were right. The judiciary, after all, is independent from the Executive and Legislative branches, and indeed is sometimes called upon to resolve disputes between the two. If the President were given a superior role in judicial appointments, it would upset the neutrality of the judiciary and the system of checks and balances of which it is a part. Unlike Cabinet members or other appointments to the Executive branch, judges do not work for the President or serve at the pleasure of the President only while he (or someday, she) is in office. So while it may be appropriate for Senators to give deference to a President's choices of the personnel who will work for him and implement his policies in the departments and agencies of the federal government—and even then, deference is not a blank check—it would be entirely inappropriate to give deference to the President's selection of judicial candidates.

The late Charles L. Black, Jr., said it well in an article in the Yale Law Journal in 1970. After arguing that a Senator should let the President have wide latitude in filling executive branch posts ("These are his people; they are to work with him"), Professor Black continues:

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[6] *U.S.* v. *Morrison*, 529 U.S. 598 (2000).
[7] *Bd. of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2001).
[8] *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 61 (2000).
[9] *U.S.* v. *Lopez*, 514 U.S. 549 (1995).
[10] *U.S* v. *Morrison*, 529 U.S. 598, at 628 (2000) (Souter, J., dissenting).
[11] *Bd. of Trustees of Univ. of Ala.* v. *Garrett*, 121 S.Ct 955, at 973 (2001) (Breyer, J., dissenting).
[12] See e.g., Donald E. Lively, The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities, 59 S.CAL. L. REV. 551, 552–556 (1986); Henry Paul Monaghan, The Confirmation Process: Law or Politics?, 101 HARV. L. REV. 1202, 1204 (1988); Gary J. Simson, Thomas's Supreme Unfitness—A Letter to the Senate on Advise and Consent, 78 CORNELL L. REV. 619, 648–49 (1993); David A. Strauss & Cass R. Sunstein, The Senate, The Constitution, and the Confirmation Process, 101 YALE L.J. 1491, 1494–1501 (1992). See generally, Charles L. Black, Jr., A Note on Senatorial Consideration of Supreme Court Nominees, 79 YALE L.J. 657 (1970); Richard D. Freer, Advice? Consent? Senatorial Immaturity and the Judicial Selection Process, 101 W. VA. L. REV. 495; Albert P. Melone, The Senate's Confirmation Role in Supreme Court Nominations and the Politics of Ideology Versus Impartiality, 75 JUDICATURE 68 (1991); William G. Ross, The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process, 28 WILLIAM & MARY LAW REVIEW 633 (1987); .

> Just the reverse, just exactly the reverse, is true of the judiciary. The judges are not the President's People. God forbid! They are not to work with him or for him. They are to be as independent of him as they are of the Senate, neither more nor less.[13]

At bottom, no judicial nominee enjoys a presumption in favor of confirmation. Rather, as numerous legal scholars have shown, it is the nominee who carries the burden of convincing the Senate that he or she should be confirmed, and any doubts should be resolved against confirmation.[14] Articulating this shared view, Professor Chemerinsky has written:

> Under the Constitution there is no reason why a President's nominees for Supreme Court are entitled to any presumption of confirmation. The Constitution simply says that the President shall appoint federal court judges with the advice and consent of the Senate. The Senate is fully entitled to begin with a presumption against the nominee and confirm only if persuaded that the individual is worthy of a lifelong seat on the Supreme Court.[15]

No person has an entitlement to a lifetime seat on the federal bench, and if a nominee cannot clearly satisfy the Senate that he or she meets all of the criteria for confirmation, the American people should not be asked to bear the risk of entrusting that individual with the reigns of judicial power. As Senator Robert Byrd said in the debate over the elevation of Justice Rehnquist to Chief Justice, "The benefit of any doubt should be resolved in favor of the people of the States." [16] He elaborated in the debate over the nomination of Clarence Thomas to the Court: "If there is a cloud of doubt, this is the last chance . . . . if there is a doubt, I say resolve it in the interest of our country and its future, and in the interest of the Court." [17]

The history of Supreme Court confirmations reflects the Senate's own understanding of its proper role as an independent—indeed, assertive—partner in the confirmation process. During its first hundred years, between 1789 and 1900, 20 of 85 Supreme Court nominees did not make it to the bench—they were rejected, withdrawn, or not acted upon.[18] Between 1895 and 1969, during a period in which many Administrations did not use judicial philosophy as a driving selection criterion, just one nominee was rejected.[19] But in the last 30 years, there has been a return to the original pattern, as five Supreme Court nominations have failed, with an additional two prevailing only after intense battles in the Senate.[20]

B. THE STANDARDS SENATORS SHOULD APPLY

In light of all that is at stake, and the Senate's constitutional responsibility to determine who will be entrusted with life tenure on the bench, the Senate must scrutinize the fitness of Judicial nominees with extraordinary care. In addition to meeting the necessary requirements of honesty, integrity, character, temperament and intellect, to be confirmed to a federal judgeship a nominee should be required to demonstrate a commitment to protecting the rights of ordinary American citizens and the progress that has been made on civil rights and individual liberties, including those core constitutional principles that protect women's legal rights under the Equal Protection Clause and the right to privacy (which includes contraception and abortion) as well ass the statutory provisions that protect women's legal rights in such fundamental areas as education, employment, and health and safety.[21]

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[13] Charles Black, A Note on Senatorial Consideration of Supreme Court Nominees, 79 Yale L.J. 657, at 660 (1970) (emphasis in original).

[14] See e.g., Charles L. Black, Jr., A Note on Senatorial Consideration of Supreme Court Nominees, 79 Yale L.J. 657 (12970); Erwin Chemerinsky, October Tragedy, 65 S. CAL. L. REV. 1497 (1992); Henry P. Monaghan, The Confirmation Process: Law or Politics?, 101 HARV. L. REV. 1202 (1988) David A. Strauss & Cass R. Sunstein, The Senate, The Constitution, and the Confirmation Process, 101 YALE L.J. (1992).

[15] Erwin Chemerinsky, October Tragedy, 65 S. CAL. L. REV, 1497, 1509 (1992)

[16] 132 Cong. Rec. S12,784 (1986) (statement of Senator Byrd).

[17] 137 Cong. Rec. S14,633-44 (1991) (statement of Senator Byrd).

[18] JOHN MASSARO, SUPREMELY POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS iX–X (1990)

[19] See id.; Richard D. Freer, Advice? Consent? Senatorial Immaturity and the Judicial Selection Process, 101 W. VA. L. REV. 495, 498 (noting that President Hoover's 1930 nomination of Chief Judge John J. Parker of the Fourth Circuit was the only Supreme Court nomination rejected by the Senate between 1896 and 1969).

[20] Richard D. Freer, Advice? Consent? Senatorial Immaturity and the Judicial Selection Process, 101 W. VA. L. REV. 495, 498.

[21] As articulated by some 200 law professors in a May 8, 2001 letter to the Senate, attached hereto, the Senate should evaluate every judicial nominee to ensure that he or she is found to:

There is widespread agreement among scholars and commentators that it is absolutely appropriate, and indeed necessary, for Senators to inquire into, and base their confirmation votes on, judicial nominees' positions and views on these and other substantive areas of law.[22]

Professor Charles Black, reasoning that a judge's judicial work is necessarily "influenced and formed by his whole lifeview, by his economic and political comprehensions, and by his sense, sharp or vague, of where justice lies in respect of the great questions of his time," concludes that a nominee's "policy orientations are material—and. . .can no longer be regarded as immaterial by anybody who wants to be taken seriously, and are certainly not regarded as immaterial by the President—it is just as important the Senate think them not harmful as that the President think them not harmful." He summariezes:

> The Constitution certainly permits, if it does not compel, the taking of a second opinion on this crucial question, from a body just as responsible to the electorate, and just as close to the electorate, as is the President. It is not wisdom to take the second opinion in all fullness of scope? [23]

Before he was a member of the Court, Chief Justice Rehnquist reprimanded the Senate for its passive role in Supreme Court confirmation proceedings in an article published in Harvard Law Record in 1959. He quoted with approval a speech made by Senator Borah on the Senate floor during the confirmation debate on John J. Parker in which the Senator Said:

> They (the Supreme Court Justices) pass upon what we do. Therefore, it is exceedingly important that we pass upon them before they decide upon these matters. I say this is great sincerity. We declare a national policy. They reject it. I feel I am well justified in inquiring of men on their way to the Supreme Court something of their views on these questions.[24]

This is nothing new; there is ample historical precedent for the Senate to consider ideology, policy views, and judicial philosophy in considering judicial nominations—dating back to George Washington's nomination of John Rutledge as Chief Justice in 1795 and his rejection by the Senate on the basis of his views on the Jay Treaty.[25] When President Wilson nominated Louis Brandies to the Court, in 1916, strong opposition was expressed based on his history of fighting for the regulation of factories and other progressive economic causes.[26] When President Lyndon Johnson proposed to elevate justice Abe Fortas to Chief Justice in 1968, his confirmation proceedings focused heavily on his prior rulings (and those of the Warren Court majority) that strengthened the rights of the accused and First Amendment protection of obscenity, and a filibuster blocked his elevation to Chief Justice.[27] It is worth noting that during the Fortas debate, Senator Thurmond made the following remarks:

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have an exemplary record in the law; bring an open mind to decision-making, with an understanding of the real-world consequences of their decisions; demonstrate a commitment to protecting the rights of ordinary Americans and not place the interests of the powerful over those of individual citizens; have fulfilled the professional obligation to work on behalf of the disadvantaged; have a record of commitment to the constitutional role Congress plays in promoting these rights and health and safety protections, and ensuring recourse when these rights are breached.

[22] See e.g., Charles L. Black, Jr., A Note on Senatorial Consideration of Supreme Court Nominees, 79 YALE L.J. 657 (1970); Erwin Chemerinsky, October Tragedy, 65, S. CAL. L. REV. 1497 (1992); James E. Gauch, Comment, The Intended Role of the Senate in Supreme Court Appointments, 56 U. Chi. L. Rev. 337 (1989); Constitutional Roles and Responsibilities, 59 S. CAL L. REV. 551 (1986); Albert P. Melone, The Senate's Confirmation Role in Supreme Court Nominations and the Politics of Ideology Versus Impartiality, 75 JUDICATURE 68 (1991); William Rehnquist, The Making of a Supreme Court Justice, HARV. L. REC., Oct. 8, 1959; William G. Ross, The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process, 28 WILLIAM & MARY LAW REVIEW 633 (1987); David A. Strauss & Cass R. Sunstein, The Senate, the Constitution, and the Confirmation Process, 101 YALE L.J. 1491 (1992).

[23] Charles L. Black, Jr., A Note on Senatorial Consideration of Supreme Court Nominees, 79 YALE L.J. 657, 658 (1970).

[24] William Rehnquist, The Making of a Supreme Court Justice, HARV. L. REC., 7–10 (Oct. 8, 1959).

[25] James E. Gauch, Comment, The Intended Role of the Senate in Supreme Court Appointments, 56 U. CHI. L. REV. 337, 358–363 (1989).

[26] Paul A. Freund, Appointment of Justices: Some Historical Perspectives, 101 HARV. L. REV. 1146, 1151–1152.

[27] ROBERT A. KATSMAN, CONGRESS AND THE COURTS 24–25 (1997). Questions about Fortas' financial dealings, which led to his resignation from the Court, were not raised until later, in 1969. HENRY ABRAHAM, JUSTICE PRESIDENTS AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 219 (1999)

> It is my opinion further, that if the Senate will turn down this nomination we will thus indicate to the President and future Presidents that we recognize our responsibility as senators. After all, this a dull responsibility. The President merely picks or selects or chooses the individual for a position of this kind and the Senate or chooses the individual for a position of this kind background, into his character and integrity, and into his philosophy, and determining whether or not he is a properly qualified person fill the particular position under consideration at the time.[28]

A number of other prominent Senators, of both parties, also have expressed the view that the philosophy of a nominee is an appropriate subject of Senate inquiry and an appropriate basis for a Senator's vote. For instance, Senator Robert Byrd has said,

> [I] is asserted that Senate inquiries into a nominee's fitness for office [are] limited to qualifications, but that others areas of obvious concern, notable his or her personal philosophy or ideology, are off limits to Senate scrutiny. It is a corollary of proponents of this view that the Senate is obligated to place its stamp of approval on a nominee so long as he or she can demonstrate the requisite minimum qualifications for the office in question. All of these assertions have been made time out of memory but, unlike love they do not become better or truer the second or third time around. Indeed, if anything, their repetition offends propriety because they are transparent appeals to political expediency and opportunism and intended to deter the responsible exercise of the advice and consent function.[29]

Similarly, Senator Lott has said:

> We should look not only at their education, background, and qualifications, but also—particularly when it comes to circuit judges—what is their philosophy with regard to the judiciary and how they may be ruling. We have a legitimate responsibility to ask those questions. . .again these are not insignificant. There are big time, lifetime, high paid jobs that are going to affect our lives, and if we do not know who they are, if we do not ask questions, then we will be shirking our responsibilities.[30]

Senators therefore have a duty to study a nominee's record and to probe during the confirmation hearing in order to form a judgment about what kind of jurist the nominee will be, based on judicial philosophy and the nominee's views on what Professor Black called "the large issues of the day." This does not mean asking a nominee for his or her personal views on questions of religion or morality or how he or she has voted on ballot measures in the privacy of the voting booth. It does mean, as reflected in past practice, probing into a nominee's views on the correctness of important Supreme Court precedents establishing the right to privacy and its application in *Roe* v. *Wade*, or the appropriate standard of scrutiny under the Equal Protection Clause for sex- or race-based classifications, or the scope of Congress' authority under the Commerce Clause or the Fourteenth Amendment to enact civil rights protections. It also means that a nominee's writings or statements should be taken seriously. Confirmation conversions should be viewed with "strict scrutiny."

Carrying out the Senate's responsibility also means that if a nominee has little or no relevant record, he or she bears the burden of assuring the Senate of his or her commitment on key issues and principles. This is particularly important when, as is currently the case, there is a President in office who has made clear that he is looking for judicial nominees of a particular type, in this case those in the mold of Justices Thomas and Scalia. The White House and Justice Department have the opportunity and ability to thoroughly vet potential nominees, before they are sent to the Senate, to ensure that those nominees do indeed fit the President's judicial philosophy requirements. Thus, it is fair to assume that a judicial candidate who appears in his or her confirmation hearing to be a blank slate has revealed him- or herself to Administration vetters to be nothing of the kind. The Senate, then, must satisfy itself as to the nominee's views on critical issues. As one scholar put it:

> No judge is a blank slate; every judge has views on important issues before assuming the bench and those preexisting beliefs influence decisions. Whether stated or not, the views still exist. Thus, a judicial candidate's re-

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[28] 114Cong. Rec. 28774 (1968) (statement of Sen. Thurmond) (emphasis added).
[29] 133 Cong. Rec. S10,829–01 (daily ed. July 29, 1987) (statement of Sen. Byrd).
[30] 142 Cong. Rec. S9,418 (daily ed. Aug. 1, 1996) (statement of Sen. Lott).

fusal to answer questions does not communicate open-mindedness, just secrecy.[31]

Nominees who refuse to provide insights into their judicial philosophy have failed to meet their burden.

These points can be illustrated with a brief look at the confirmation hearings of Clarence Thomas to the Supreme Court (before Anita Hill's allegations of sexual harassment surfaced), and specifically what happened when he was asked about his views on *Roe* v. *Wade*. Then-Judge Thomas had a prior written record of his views on *Roe* but attempted to explain them away during his hearing. Asked about his enthusiastic praise of an anti-abortion polemic by the Heritage Foundation's Lewis Lehrman (Justice Thomas had called it "splendid "), he explained that he had merely skimmed the article and was praising it for a different reason. Asked about a report of a White House Working Group on the Family that he had signed, which was highly critical of the Supreme Court's protection of privacy and which had pronounced *Roe* "fatally flawed," Justice Thomas said that he had signed the report but had never read it.[32] Other anti-*Roe* writings he disowned by explaining that he wasn't a Supreme Court Justice when he wrote them, so they had no relevance to what he would do on the Court.[33]

At the same time, Justice Thomas repeatedly insisted that he had no ideological agenda on the right to choose and had a completely open mind. "I have no agenda," "I don't have an ideology to take to the Court," and "I retain an open mind," he said when asked about *Roe* and the right to choose.[34] Asked by Senator Biden whether the right to privacy a woman's right to terminate a pregnancy, Justice Thomas said he could not comment without undermining his impartiality.[35] Others pressed him again and again, and he simply refused to say what he thought. And many recall the exchange with Senator Leahy in which Justice Thomas claimed he had never discussed *Roe* with anyone, even though the decision came down when he was in law school.[36]

In the face of all of these assurances of a completely open mind, a mere eight months after this testimony Justice Thomas he joined Justices Rehnquist, Scalia, and White in a Rehnquist opinion that said, "We believe that *Roe* was wrongly decided, and that it can and should be overruled consistent with our traditional approach to stare decided in constitutional cases." *Casey* at 944 (emphasis added). And he has not wavered from this view. Just last year Justice Thomas wrote that *Roe* was "grievously wrong."[37]

Reporters have subsequently documented that prior to Justice Thomas' confirmation hearing, the White House had made a firm decision that Justice Thomas must disclose nothing harmful at the hearing, and specifically that he must not indicate hie opposition to *Roe* v. *Wade* because it could jeopardize his confirmation. One of his handlers conceded, on the record, that this was a calculated strategy.[38]

I hope that Senators will bear this experience in mind as future nominees, both to the high court and to the lower federal courts, come before the Senate. The stakes are too high—especially on such a closely-divided Supreme Court, and Courts of Appeals that already reflect an imbalance to the right—to allow nominees to walk away from their past or to shield their views and ideology from Senate and public scrutiny.

III. Conclusion

As Senators, you hold the tremendous power and responsibility to "advise and consent" on federal judicial nominees. How you exercise that power and responsibility—the degree to which you are demanding and thorough in examining the records and views of the nominees that come before you, and the extent to which you are willing to assert you Constitutional prerogative to say "no" when appropriate— will have a tremendous impact on the lives of American citizens for many years to come.

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[31] Erwin Chemerinsky, October Tragedy, 65 S. CAL. L. REV. 1497, 1506 (1992).

[32] Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary, 102nd Cong. 129–30 (1991) [hereinafter Thomas Hearings].

[33] Thomas Hearings at 231–2, 264–67.

[34] Thomas Hearings at 180, 296

[35] Thomas Hearings at 127.

[36] Thomas Hearings at 222–23.

[37] *Stenberg* v. *Carhart*, 530 U.S. 914, 980 (2000) (Thomas, J., disenting).

[38] JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS 210 (1994).

Chairman SCHUMER. Thank you, Ms. Greenberger.

Our final witness is Mr. Clint Bolick. Mr. Bolick currently serves as vice president and director of litigation at the Institute for Justice, which he cofounded in 1991. Mr. Bolick received his law degree from UC-Davis and his undergraduate degree from Drew University. In addition to publishing a book and numerous articles on constitutional law topics, Mr. Bolick has successfully litigated on behalf of school choice programs and inner-city businesses.

Mr. BOLICK, your entire statement will be put in the record, and proceed as you wish.

STATEMENT OF CLINT BOLICK, LITIGATION DIRECTOR, INSTITUTE FOR JUSTICE, WASHINGTON, D.C.

Mr. BOLICK. Thank you for the honor of testifying today. I can't claim to be from any of your States, but we do try to file lawsuits there as often as possible.

Chairman SCHUMER. Don't we know it.

[Laughter.]

Mr. BOLICK. The dangers of using ideology as a sole criterion to evaluate judicial nominees can be illustrated in the cases of two sitting Supreme Court Justices. When one was nominated, he was opposed by left-wing special interest groups who vilified him for being anti-women and insufficiently supportive of civil rights. Another nominee, a former law professor, was opposed by consumer groups who believed he would vote consistently to uphold business interests.

Those judicial nominees who were opposed for being too right-wing were, of course, Justices David Souter and Stephen Breyer. Now, in hindsight, those Justices have shown themselves to be so liberal that perhaps in those two cases only we should have listened to those groups and opposed the nominations.

But the point is that it is a hazardous enterprise to try to extrapolate judicial philosophy from scattered academic writings or lower court rulings. It is even more hazardous for the Senate to take its cue from ideological organizations that themselves are so far outside the mainstream that they could ever have considered David Souter and Stephen Breyer to be too conservative.

That is especially true for the overwhelming bulk of this committee's work in the area of the judiciary, which is, of course, not Supreme Court nominations but appointments to district and appellate courts. This Committee and the Senate are being called upon by special interest groups to create what amounts to a judicial blockade, elevating ideological considerations to an unprecedented veto role in the confirmation process.

These groups have voiced wholesale opposition not to a specific nominee, but to an entire group of highly qualified judicial nominees solely on ideological grounds. If they succeed, it will plunge this Nation into a judicial crisis of historic proportions.

I fear that this hearing is an attempt to place an academic fig leaf on this campaign of judicial obstructionism. That would jettison 200 years of Senate practice whereby judicial nominees for lower courts consistently have been greeted with a presumption of confirmation, even in times of divided Government.

Some are now saying that the Senate should abandon any pretense of bipartisanship and play tit for tat, or as the Chairman used the term before, and I prefer that one, "gotcha" politics. The last Senate, like previous Senates, slowed confirmations in the President's last year, but it seems that the level of statesmanship descends to a new low each time.

Now, the slowdown is threatened to occur not in the President's final year but in his first year. That is exactly the type of brazen partisanship that the American people dislike. And I assure that if it persists, they will know about it and will respond.

Why should lower court nominees not be judged solely on the basis of ideology? For a simple reason, because renegade judges can and are reined in by higher courts. A lower court judge cannot overturn *Roe* v. *Wade* or uphold prayer in the schools or overturn *Miranda* rights. Occasionally, they have tried, and the Supreme Court, this supposedly conservative, activist Supreme Court, has rejected such efforts.

That is why Senators like Joe Biden have declined to invoke ideological litmus tests for lower court judgeships, focusing on qualifications and an assurance that nominees are not so ideologically driven that they cannot faithfully apply the Constitution and precedents of the U.S. Supreme Court. The Senate should not heed the demands of special interest groups to jettison those time-honored standards.

We find ourselves today paradoxically in a time of both quietude and crisis regarding the judiciary, quietude because the majority of Americans are satisfied with our courts. Unlike in times past when the people perceived the courts as straying too far to the left or right, attempts to make the judiciary an issue in the last election proved unavailing. A recent New York Times poll found that a majority of Americans think that Bush nominees will be about right, though 14 percent, I might add, think they will be too liberal.

The reason for this quietude is that the courts are doing a good job. Gone are the days when courts routinely took over school and prison systems, assumed the tax power, created welfare rights, and let criminals out on technicalities.

Our current Supreme Court defies easy categorization. This supposedly conservative, activist Court struck down a law banning flag desecration. It placed *Roe* v. *Wade* on firmer jurisprudential ground. It invalidated efforts to restrict gay rights ordinances. It struck down Virginia Military Institute's ban on women, and just yesterday it once again upheld campaign finance reform. Conservatives were among the majority in every single one of those cases.

Just this month, the Court struck down thermal imaging searches by a slender 5–4 majority. Thankfully, Justices Thomas and Scalia were on the Court to provide the vital swing votes to reach that decision. Our report on the "State of the Supreme Court 2000" finds this Court to be one of the consistently most pro-individual liberty Courts in the past century. Moreover, the courts are in balance. Roughly half of our Federal judges were appointed by Democrats, the other half by Republicans, and mostly Reagan and Bush judges are retiring.

But we are also in crisis. The number of vacancies is over 100, with roughly one-third classified as judicial emergencies. The oper-

ative number in terms of resolving that crisis is zero, which is the number of hearings and confirmations so far during this administration——

Chairman SCHUMER. Are you complaining about Senator Hatch?

Mr. BOLICK. Yes, Senator Hatch did try to move things along.

—despite the administration's alacrity in nominating judges and the fact that the American Bar Association has found each nominee that it has evaluated so far either qualified or well qualified.

The bipartisan task force on which Lloyd Cutler served on judicial selection issued a report last year, before it knew which party would occupy the White House, with recommendations to solve this judicial crisis. It decried the use of blue slips which, in its words, "undermine collective decisionmaking in an open, deliberative process," and it urged confirmation votes by the full Senate within 60 days of nomination.

In 1997, Senate Patrick Leahy declared, and again I quote, "Those who delay or prevent the filling of judicial vacancies must understand that they are delaying or preventing the administration of justice." Those are words for the Senate to live by.

My group has always believed in a rigorous advice and consent role for the Senate. At the same time, we did not oppose a single judicial nominee in the Clinton administration, not because they weren't liberal, which many of them were, but because for the system to work requires self-restraint and, for our group to maintain its integrity, requires us to choose our battles judiciously.

Now, the Senate's credibility is on the line. I implore this body to place statesmanship over partisanship in the confirmation of judges. Please do not allow yourselves to be enlisted in an unprincipled campaign of judicial obstructionism.

Thank you.

[The prepared statement of Mr. Bolick follows:]

STATEMENT OF CLINT BOLICK, LITIGATION DIRECTOR, INSTITUTE FOR JUSTICE

I offer this statement on behalf of the Institute for Justice, a libertarian public interest law firm that litigates nationally in support of individual liberties and limited government.

We have always asserted, in Democratic and Republican administrations alike, that the Senate's advice and consent role should be both robust and principled. At the same time, the President is constitutionally entrusted with the authority to nominate judges; and in past administrations, the Senate has accorded due deference to the President to nominate judges who reflect his philosophy. To preserve the independence of the judiciary and to keep the confirmation process moving, the Senate has focused primarily on the qualifications and judicial temperament of nominees to district and appellate judgeships, confining questions about ideology to nominees' ability and willingness to abide the constitutional oath and adhere to the rule of law.

What we are now seeing is an effort by left-wing advocacy groups like People for the American Way and the Alliance for Justice to elevate ideology to an unprecedented level of consideration. They seek to manipulate the Senate into abandoning its traditional role and bringing the judicial confirmation process to the halt, solely on the grounds that the President is nominating highly qualified judges who share his philosophy. And I fear that this hearing, far from exploring important philosophical issues, is really a an attempt to place an academic fig-leaf on a partisan and fiercely ideological campaign of judicial obstructionism.

Although my organization is keenly interested in the composition of the judiciary, I want to state at the outset that the Institute for Justice did not oppose a single judicial nominee during the eight years of the Clinton Administration. That is emphatically not because the Clinton Administration nominated only moderate judges—to the contrary, Clinton's judicial appointees as a whole, and especially his ap-

pointees to the U.S. Supreme Court, have been demonstrably more liberal than the judges appointed by Presidents Reagan and Bush.

Rather, the reason that we refrained from opposing Clinton judicial nominees is selfrestraint. We believe that it is essential to the integrity of our organization to choose our battles carefully. For nominees to judgeships in district courts and courts of appeals-whose decisions are subject to review by higher courts-our touchstone is whether a judicial nominee is so extreme that his or her willingness and ability to enforce the rule of law is seriously called into question.

That is not just our touchstone-it reflects the same approach that the U.S. Senate has traditionally taken toward lower court judgeships for 200 hundred years. The approach was summed up in 1994 by Sen. Joseph Biden, who articulated three attributes that he would consider for nominees to district courts and courts of appeals:

> First, that the nominee has the capacity, competence, and temperament to be on the court of appeals or a trial court.
> Second, is the nominee of good character and free of conflict of interest?
> Third, would the nominee faithfully apply the Constitution and the precedents of the Supreme Court?
> If they meet those three tests, assuming they are not on the ideological fringe and they are not someone who is so out of the mainstream that you either question their competence, you question their character, you question their temperament. . ., then it seems to me they should be given an opportunity to fulfill the seat for which they have been named.

This approach reflects well the respective constitutional roles given to the President to make nominations and for the Senate to advise and consent. At a time of divided government, the system would grind to a halt if the Senate refused to confirm nominations based on mere philosophical differences. Historically, and continuing in recent years, Republican Senates have confirmed the vast majority of Democratic administration judicial nominees and vice-versa. If we are contemplating a sea-change where the Senate delays or denies confirmation to wellqualified, mainstream judicial nominees on differences of philosophy-or, more egregiously, to the ideological whims of a single Senator withholding a "blue slip"—we had better contemplate the serious consequences. As Senator Patrick Leahy declared in 1997, "Those who delay or prevent the filling of [judicial] vacancies must understand that they are delaying or preventing the administration of justice."

Not only will such tactics paralyze the confirmation process-creating or exacerbating a judicial crisis-but it will create an entirely new rule for future confirmations. Democrats have accuse epu scans o holding up judicial confirmations during the Clinton ministration, notwithstanding that about 375 judges (almost half the federal judiciary) were confirmed during that time. The point is that judicial confirmations have taken longer in each succeeding administration, leading us to the point of judicial crisis. Adding greater ideological scrutiny to the process will slow it down even further.

That comes, remarkably, at a time of relative public quietude regarding the federal judiciary. Americans seem satisfied with their courts. And for good reason: the era in which activist judges were taking over school and prison systems, imposing judicially created taxes, creating welfare rights, and letting criminals out on technicalities seems largely behind us. Whenever the public perceives that the judiciary is straying too far from the public consensuswhether in the heydey of the Warren Court or when the Rehnquist Court seemed poised to overturn *Roe* v. *Wade*-it can and usually does produce a democratic correction. In the past election, Vice President Gore tried gamely to make an issue of judges, but to little avail. To the contrary, the New York Times recently found that a majority of Americans believe that President Bush will appoint judicial nominees who are about right. (Some think his nominees will be too liberal!)

And indeed, President Bush's record so far is remarkably good. His first group may comprise the most highly qualified group of judicial nominees ever put forward at a single time. They are a bipartisan group and richly experienced as judges or attorneys. The American Bar Association-whose ratings have been referred to by several Democratic senators as the "gold standard"-have given "qualified" or "well-qualified" ratings to every nominee evaluated so far. In terms of judicial philosophy, several of the nominees have argued numerous cases in the Supreme Court and compiled stellar winning records, demonstrating that they are well within the mainstream of American jurisprudence.

Nor will the nominees significantly alter the balance in the judiciary. Roughly half the federal judiciary are Republicans and half are Democrats. Most of the current retirements are from Republican judges.

But balance is not what the left-wing advocacy groups are after. They want to post a sign outside the door of the federal courthouse reading, "No conservatives need apply." They want this Senate to do their bidding, denying confirmation to anyone who does not share their activist agenda. That these groups are themselves anywhere near the "mainstream" of public opinion is laughable. The Senate should not take its lead from such groups.

Nor should it seek to do so indirectly by attempting to clothe judicial obstructionism with an academic veneer. With due and tremendous respect to Professor Tribe and Professor Sunstein, their writings have not been aimed at greater objectivity or balance in judicial confirmations, but at creating a more liberal judiciary in accord with their own philosophical predilections.

Their real complaint is with the U.S. Supreme Court, which they characterize as an activist conservative court. They do not disdain judicial activism in general-surely they applaud many of the activist cases of the Warren era-but they dislike a Court that will rein in other branches of government to vindicate principles such as federalism, equality under law, and private property rights. Of course, the Court cannot rein in government if government itself is not testing the boundaries of activism; and it is precisely the role of the judiciary, articulated most eloquently in The Federalist No. 78, to ensure that the other branches of government do not overstep their constitutional boundaries. Moreover, we need to keep all this in perspective: after all, this is the Court that struck down laws prohibiting flag desecration; that invalidated Virginia Military Institute's ban on female students; that struck down Colorado's initiative prohibiting gay rights ordinances; and that placed the right to an abortion on firmer constitutional ground. These are not hallmarks of a "right-wing" Court-although conservative justices voted with the majority in all of those decisions.[1]

The bottom line, though, is that the academics' advice is a recipe for partisan and ideological gridlock. Sometimes gridlock is good, but not when it paralyzes the judiciary, whose role in protecting fundamental individual liberties is central to our constitutional system. Presently, there are over 100 judicial vacancies. About one-third of them have been classified as judicial emergencies. As each day passes, the specter of judicial obstructionism becomes evergreater a populist issue, with an appropriate threat of popular backlash.

Facing the threat of gridlock, last year a Task Force on Federal Judicial Selection issued a report entitled "Justice Held Hostage: Politics and Selecting Federal Judges." The Task Force was remarkably bipartisan, including such liberal luminaries as Professor Norman Dorsen and Elliot Mincberg of People for the American Way. Among other things, the Task Force finds that the Senate "should make it a high priority to take final actions on nominees in a more expeditious manner." It specifically decries the blue-slip process, which "should not be allowed to undermine collective decision-making in an open, deliberative process." It urges nominations within 180 days of vacancies and confirmations within 60 days of nominations. By moving nominations to a prompt vote by the full Senate we can have a robust and open debate about ideology in judicial nominations and about individual nominees' philosophies. And, in the end, I am confident that we will have the vast majority of judges confirmed.

But so far the operative number is zero, which is the number of hearings scheduled and confirmations made so far. Instead of having hearings on the role of ideology in judicial nominations, this Committee should be moving forward and applying the same rules and principles it has applied for two centuries.

In the coming days, my organization will remind Senators, and the public, of comments that Senators made about the judicial crisis, and the proper role of the Senate, during the previous Administration. We will work to alert the public to the existence of a de-facto judicial blockade if one is imposed by this Committee. And, of course, we will make our most reasoned and passionate arguments in support of nominees who have manifested a commitment to the rule of law and the principles of a free society.

In the meantime, we will see what emerges in the Senate. Will this be a time of statesmanship? Or will senators act as marionettes in a tableau of judicial obstructionism choreographed by left-wing special interest groups? Our nation desperately needs statesmanship. I hope that this hearing will lead us in that direction, but I fear it is a step in the direction of ever more-rancorous partisanship.

Chairman SCHUMER. Thank you, Mr. Bolick.

[1] Our report, "State of the Supreme Court 2000," can be found on the Institute for Justice website at www.ij.or.g. We find that the Rehnquist Court has compiled an excellent overall record on protecting individual liberties.

What I am going to do—I checked with Jeff—is call on Senator Durbin, who hasn't had his chance and has to be going on, and then we will have a whole series of questions after that.

Senator Durbin?

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thank you, Mr. Chairman, for this important hearing which I believe will be a precursor for a national debate which will ensue over the next several years.

Congressmen, Senators and Presidents come and go. Supreme Court Justices hang around forever. The hand of Richard Nixon, who has been gone from this city in an official role, is still on the Supreme Court 25 years later.

I believe that our Attorney General was able to muster 58 votes in the Senate because he sought the refuge of "settled law." I don't believe that Supreme Court Justices, even circuit court judges, can expect the same treatment if they come before the Judiciary Committee. More penetrating questions will be asked.

I would like to say to Ms. Greenberger, I think you make an excellent point when it comes to Clarence Thomas' testimony. That kind of evasion I don't believe is going to be successful in the future. People have to be more honest in terms of what they really believe if they expect to be treated in a professional manner.

Now, I have watched this Committee since I have been in the Senate over the last several years and even before, and it was curious to be on the Judiciary Committee during the years of the Clinton presidency and watch the grilling that many of his judicial candidates faced. These candidates had to go through a "Manchurian Candidate" drill where they had to parrot their disdain for judicial activism, in all works and all its pomps, if they had a chance before this committee.

Then it was interesting to watch as people tried to explain what judicial activism was. I guess it came down to the fact that judges had to pledge that they would take a law and interpret it within its four corners. They would be passive and reactive and not add a thing to it. That seemed to be the standard the Republican majority applied.

I don't think anybody anticipated what this Supreme Court has done, as Professor Sunstein said, which took their disdain for judicial activism and proceeded to strike down more Federal laws per year than any Supreme Court in the last half century, as you have testified.

So it leaves us in an interesting situation, and I would like to ask Professor Presser if he would address this. He said in his testimony that we must maintain a separation between law and politics on the Court. Was that separation breached by the Supreme Court in either the *Brown* v. *Board of Education* decision or *Roe* v. *Wade*, where we had important national issues that were clearly unresolved by either Congress or the State legislatures?

Mr. PRESSMAN. Do you want me to answer that now?

Senator DURBIN. Sure.

Mr. PRESSMAN. I would separate the two. It seems to me that the Brown decision is quite supportable under the 14th Amendment,

maybe not under the grounds that the Warren Court used, but broadly under the notion of a color-blind Constitution. Yes, I think that decision was very much a separation of law and politics.

Roe v. *Wade* I am not so sure about. I think that is an issue that belongs within the States. I think Scalia is right about that. It is important to understand that you can protect women's rights through other means than the Federal courts and the Federal Government. That is what your State governments—and you were a State government official for quite some time, if I remember correctly. That is the job of State governments, as well as others, local governments too.

Some don't belong in the Federal sphere. *Roe* v. *Wade* I think is one of those cases, but *Roe* v. *Wade* is the law of the land, at least as interpreted in *Planned Parenthood* v. *Casey*. And I don't know of any proposed Federal lower court nominees who would ever be in a position to overrule that, and the Supreme Court has made pretty clear that it doesn't intend to either.Senator DURBIN. Professor Tribe, would you address this issue of judicial activism and whether or not liberal courts and conservative courts cross that line?

Mr. TRIBE. Certainly, Senator Durbin. As I started to say in my principal testimony, I very much think—and I have submitted a memorandum to the Senate on this subject—that the current Court has been the most activist, as measured by either the statistical frequency of its invalidation of duly enacted laws passed by Congress or, more sensitively, as measured by its lack of deference to either Congress' fact-finding abilities in areas where under the approach of *McCulloch* v. *Maryland* there would be no second-guessing of Congress' determination about, for example, the connection between violence against women and the economy and commerce, or in terms of the ability of Congress to take a somewhat more generous view of certain rights than those that for institutional reasons the Court is bound to take.

The Religious Freedom Restoration Act is a perfect example. Almost unanimously, the House and Senate concluded that the Supreme Court, in Justice Scalia's opinion in *Employment Division* v. *Smith*, had trampled on religious freedom by stripping it of its historic protection under earlier Supreme Court decisions, protection from severe burdens imposed by neutral rules of general applicability.

And Congress dared, in the name of section 5 of the 14th Amendment, to say we believe that the religious liberty that is protected by the 14th Amendment against the state is broader than what the Court thinks it is. And then it proceeded to reinstate, in effect, the standards the Court had used before.

But the preamble of the law, in effect, dared the Court to defend its prerogatives by daring to criticize the Court's decision in *Smith*, and the Court lashed back in a decision that has rightly been described as enlisting the support even of Justices Breyer and Ginsburg. That didn't make it right. I think it was an outrageous decision, without any real warrant in the separation of powers.

I could give examples of age discrimination and discrimination against the disabled. Marcia Greenberger nicely humanized them by talking about the individuals involved. It is no answer in those

cases to say, with Professor Volokh, that as a matter of form the Court was acting within the bounds of the separation of powers because, after all, it was simply vindicating the structural limits.

Well, you can call it that, but the question is what content does that concept have. And even when the Congress does not stray from the organization chart, as the Court has set it up, but simply decides to go a little further than the Court thinks is necessary in the Patent Clarification Act, in *Florida Prepaid* and *College Savings*—these are not all just civil liberties cases—over and over and over again this Court seems to think that it is its job to—let's coin a phrase—legislate from the bench perhaps. Now, it seems to me that is not right and it is not made right.

Senator DURBIN. Or perhaps veto from the bench.

Mr. TRIBE. Or veto legislation. Of course, liberal courts do it as well.

In my view, *Roe* v. *Wade* was an entirely justifiable protection of the fundamental human liberty of women. I know it is controversial, but to say women can get protected by the States is really like relegating them to the back of the bus.

I think Lincoln was right when he said the Nation can't exist half slave and half free, and on certain fundamentals like this there has got to be a coherent approach. The approach might be to protect the fetus, although that is not really my view. It might be to protect the woman, and that is really where the Court has come out. But one way or the other, the Constitution speaks to these fundamental questions, and you as a Senate need to know how a prospective judge or justice would listen to what the Constitution says, how would that person understand and approach the great silences and ambiguities of the Constitution.Senator DURBIN. I appreciate that, and I would just say to Professor Bolick, as well as Professor Sunstein, I think it is naive to believe that any Judiciary Committee is going to ignore the ideology of any candidate or any nominee for the Supreme Court.

I think some of the quotes in Ms. Greenberger's presentation about Senator Borah and others in the past have made it clear that it would be naive to believe that we have faith in the laws that we enact and yet don't care how the men or women serving on the Court view them. I think that is bound to be a question of inquiry.

Professor Sunstein, you come to the conclusion that we need intellectual diversity. One branch of Government should respect the other branch of Government. I think as a model or a goal, that is certainly praiseworthy. It is hard to imagine President Bush saying, you know, on balance, I guess the Supreme Court is a little conservative, I had better put a liberal on there. I just can't see that. I doubt that that is going to occur.

It is more likely that he is going to draw from his own political will to find somebody to put on the Supreme Court, which then is going to challenge us. Some have said this Court is a few centrists and a lot of people on the right. It is going to challenge us to ask whether there is this intellectual diversity that you have asked for.

So does this put a burden on us to seek balance and diversity where it may not currently exist?

Mr. SUNSTEIN. Yes. I would distinguish between the Supreme Court and the lower Federal courts. It would be perfectly appro-

priate for the White House and the Senate to work together to ensure that there is a breadth of opinion within the lower Federal courts, and that would be very desirable for the country.

With respect to the Supreme Court of the United States, President Bush is within his rights to nominate a conservative, and I don't believe that the Senate should insist that he not do that. There are two different sorts of conservatives, and it is important to underline this point because this is something on which Republican and Democratic Senators really might be able to agree.

Some conservatives believe that the Court should be very cautious before it strikes down an act of Congress. Chief Justice Rehnquist, especially in his early days, really insisted on that, that it is very important for the Supreme Court to respect Congress' prerogatives. And much of President Reagan's rhetoric was really like that. That is a form of thinking that really cuts across liberal and conservative lines. It is a deferential, respectful Supreme Court.

There is another kind of conservative who believes that they have access to what the Constitution really means as originally understood, and that Constitution protects commercial advertising, forbids affirmative action programs, maybe protects the right to bear arms, very broadly understood, and acts like a weapon against Congress.

Now, for those who believe that campaign finance reform and affirmative action programs are often bad ideas, it is really a mixed blessing to want the Supreme Court to vindicate that view, at least all of the time. So the suggestion is really a simple one. If President Bush wants to nominate a conservative for the Supreme Court, he is entirely within his rights to do that, but please let him nominate a conservative who is very respectful of the prerogatives of the democratic branches. That is the kind of conservative that we have seen much too little of in the last 10 years.Senator DURBIN. Thank you. I want to thank the panel and thank the chairman.

Chairman SCHUMER. Thank you, Senator Durbin, for some excellent questioning.

First, we have a few housekeeping measures. Senator Kennedy's statement should be read into the record. He explicitly apologizes to the Committee for not being here. He is on the floor with the patients' bill of rights.

A letter from Professor Yalof and a letter and law review article from Professor Tulis will be put in the record, without objection.

First, just preliminarily, both Professors Presser and Volokh did talk about what is mainstream, what is the right interpretation, but I didn't see any contradiction in your testimony that these shouldn't be questions that we should be asking prospective nominees to the Court.

Is that correct?

Mr. PRESSER. Before I answer that, I take it that all of our full statements will be entered into the record.

Chairman SCHUMER. Yes, indeed. I just want to bring that out here.

Go ahead.

Mr. PRESSER. It seems to me that, first of all, as a U.S. Senator you can ask anybody anything you want in any hearing, and I admire you for that.

Chairman SCHUMER. It is not as broad as you think.

Mr. PRESSER. It seems to me that you are well within accepted practice if you ask a nominee, tell me about what your philosophy of judging is, tell me what you think about the role of precedent, tell me what you think a lower court judge ought to do. If you get answers to that that suggest that somebody is way out of what we might regard as the mainstream, I think that is entirely an appropriate thing to do.

I would go further, and maybe not everybody would agree with this. It seems to me that you are also within your rights if you ask about particular issues, and then the nominee would be within traditional practice if, for the response to certain questions, he or she indicated, well, that is something that might come up before me as a judge and I don't want to talk about, or the perspective that I would take on this is very different if I were a judge than what I have voiced in prior positions. But with the parameters that I have laid down, I think all of that is fair game.

Chairman SCHUMER. Do you agree with that, Professor Volokh?

Mr. VOLOKH. I think this is actually a very difficult question. I think there are great arguments to be made on both sides. I think that Professor Presser has basically -I think that his view is a sound one, but I do think there are good arguments to be made both for a more restrained view of making sure that one never asks a nominee something that might commit him in the future, and for the opposite view as well, which is to probe as closely as possible.

Chairman SCHUMER. Mr. Bolick, you said ideology shouldn't be the sole determination of what is a judge. I presume you are saying that it is a relevant issue when a judge comes before us. I don't want to get into an argument here of what is mainstream and what isn't. Obviously, that is different.

I want to get into an argument of what best moves the process forward to avoid the kind of "gotcha" politics that everyone has decried here. If you ask the American people, does ideology enter into the process, they will say yes. They would have said yes before *Bush* v. *Gore*. They certainly say it now. In fact, for the first time we have a real division among Democrats and Republicans in terms of respect for the Court. But even leaving that aside, they always think so.

When we vote on judges, when there are controversial votes, it splits along mostly ideological lines. So to say that ideology isn't part of it—whoever wants to say that can do it, but the American people are incredulous, and rightly so, because we all know just by an observation that it happens.

The question is has our judicial process, the way we do this, gotten so away from—has it become sort of a kabuki game, as opposed to talking about these issues right up front, and it damages the process, it damages the judiciary, and doesn't lead us to the right people? I would like to have had this hearing when the opposite occurred, if there were a Democratic President and a Republican Congress. I think the answers should be the same.

But it is my inclination, as I said at the beginning, that ideology, broadly defined—I don't mean are you a Democrat or a Republican, but your views, and I am going to get to that in a minute as to what people think would be permissible and salutary questions.

I take it you don't disagree with that either, Mr. Bolick. You emphasized the adjective "solely," and I would agree with that.

Mr. BOLICK. That is right, Mr. Chairman, and I would make a further delineation. I think that the context for a Supreme Court confirmation is one in which a much more robust exchange on these issues is extremely relevant because that person does not speak to a higher authority.

Traditionally, for lower court judges, liberal Senators have voted for conservative judges and conservative Senators for liberal judges. That, I believe, is the issue that some groups are attempting to place on the table right now, and I think that we would suffer a tremendous problem in the confirmation process were that to be a larger issue than it is right now.

Chairman SCHUMER. Fair enough. What is interesting is the first panel, both the counsels, seemed to say, well, let's just look at the excellence of the qualifications. But I think, to a person, this panel is saying, no, look at some of these other issues.

Now, the difficulty, in my judgment, is how closely do you look. To say will you uphold the Constitution, are you a democrat or do you harbor some other ideology—that is so obvious that that is not going to get you very far, and that is just a refuge.

On the other hand, we are getting into don't ask about specifics. I think, and you folks have more erudition than I do, that that came about because you didn't want potential judges to talk about specific cases that they might litigate. So, yes, if it is a very narrow case that is coming before the Court and this judge might be part, you would certainly not want to ask them that.

But there is a range in between, and I would like to ask people on certain issues whether they think it would be out of bounds to ask the following. Let's take campaign finance. Would it be impermissible to ask a potential Supreme Court nominee—and let's put it at Supreme Court for the moment—do you believe the First Amendment applies to campaign finance limits? No one would disagree, correct? That would an OK question to ask?

Mr. PRESSER. I might disagree with that. It is important to bear in mind, Senator—and maybe other panelists can correct me if I am wrong, but the first Supreme Court nominee actually ever to appear in person for a Senate hearing, I think, was Felix Frankfurter, who almost didn't make it because he had a class to teach at Harvard and decided maybe that was more important.

The phenomenon of questioning people in person is a very recent one. Now, if you are going to do it, you must ask questions about what sort of questions to ask, but the process worked reasonably well when you just looked at a candidate's record without having him in front of you. So I am not at all certain that the process as currently done, especially when it amounts to a very partisan hearing, is the right thing to do to preserve the separation between law and politics.

But the campaign finance question that you are asking is very much one that is likely to come before the Supreme Court, and I

am not sure that one wants to go on record, if one is a nominee, with a particular position on that.

Mr. TRIBE. Could I say something, Mr. Chairman?

Chairman SCHUMER. Professor Tribe, yes.

Mr. TRIBE. First of all, I think that we have all experienced the end of innocence. It may have been that once upon a time one of my former colleagues, though I was then, I guess, an embryo or something, thought it more important to talk to his class than to appear before the American people as a prospective Supreme Court Justice. Those days are gone and we can't return to them. I don't think it would be a wise thing to return to them. People have awakened to how much is at stake, and the White House is certainly so sophisticated at the selection process that for the Senate to say, well, we are going to go back to the golden days and pretend wouldn't really work.

Secondly, as to your question, does the First Amendment apply to campaign finance limits, I would have thought that any person who would be reluctant to answer that would be disqualified right away. Of course, the First Amendment applies. The question of how it applies and what it means is perhaps what you might then want to ask, and how far we go down that chain.

Just as Professor Sunstein earlier said, anyone who thought that the Bill of Rights shouldn't apply to the States through the 14th Amendment would be outside the ball park, if someone said, well, the First Amendment applies, Senator, to Federal finance limits, but not State finance limits because I don't believe the Bill of Rights is incorporated against the States, you could say thank you very much, Mr. President, who is your next nominee?

Chairman SCHUMER. But it is certainly a legitimate question. Would anyone, aside from Professor Presser, disagree with that? I want to get a little more specific. I don't want to dwell on this because I think, Professor Presser, the idea that we shouldn't have hearings or shouldn't ask witnesses such broad-gauged questions like that is probably out of the mainstream.

Mr. PRESSER. Well, let me say I don't disagree with what Professor Tribe said. If it is simply, is this an issue with First Amendment implications, of course anybody would say yes. I thought you were suggesting specific statutory provisions.

Chairman SCHUMER. I am going to get to that.

Mr. VOLOKH. Senator, I think that Professor Tribe's point is an excellent one and it ties in to what I was saying. Setting aside the question of whether it is proper or improper to ask a question like that, the difficulty is if you ask a question that is too specific—how would you rule on the statute—then you might get into an area where a lot of people would feel uneasy. If you ask it too generally, you are going to get virtually no useful information.

Chairman SCHUMER. Correct, but let me ask you this one. Let's take the next one down the line. Is there anything wrong with asking, do you agree with *Buckley* v. *Valeo* and would you overrule it if a new case came up? Now, how is that one? I would want to know the answer if a nominee came before me. I think *Buckley* v. *Valeo* was a bade decision, OK?

Senator SESSIONS. Are you going to vote against them if they won't tell you that or if they don't agree with your interpretation of *Buckley*?

Chairman SCHUMER. Are you going to vote against them? I don't think any single issue would drive me to vote for or against someone, but I would want to know their overall set of views. And when we had some of our colleagues here saying don't have a litmus test—and often that relates to choice and we all have different views on choice—but a litmus test saying you must be this way on this issue or I won't vote with you, there may be some people who feel that way. I don't, but that doesn't mean I don't want to know their view.

Go ahead, Professor Sunstein.

Mr. SUNSTEIN. I think the problem with that is that someone might reasonably think I am just not sure whether I agree with *Buckley* v. *Valeo*.

Chairman SCHUMER. That is fine.

Mr. SUNSTEIN. And they don't want to pre-commit themselves. So I think they would be entirely within their rights to say I am not sure, or I have a clue, but I don't want to pre-commit myself. And then you would be within your rights to say, well, that is a great answer, that is a bad answer, and that is relevant.

The trick with these specific questions is they might get the nominee in inappropriate territory, and there is a limit to how much you can get if you have someone who is both public-spirited and clever. You won't get anything out. So the trick is to come up with something that is neither too specific nor general.

Let me just float an idea that is in the terrain. I am not sure if it is a good idea, but it is in the terrain of something that would work. You might ask someone, are you someone who has as your most admired people on the Court or the people whom you tend to think are right—is it Thomas and Scalia, is it Brennan, Marshall and Blackmun, is it Kennedy and O'Connor, or is it Breyer and Ginsburg? That is to identify four kinds of camps and that would be an informative answer. If they say "I am a Brennan-Marshall-Blackmun type," then the President is going to be very unhappy with some of his advisors.

[Laughter.]

Mr. SUNSTEIN. If the person says "I am a Kennedy-O'Connor type," they are under oath and they are telling you something quite important, as distinguished from a Thomas-Scalia type. It is not clear that is the right question specifically, but that is the direction, I think, rather than a specific question.

Chairman SCHUMER. But would you say, then, asking about how people felt about previous cases, established law no longer being litigated at least at the moment, is a bad idea?

Mr. SUNSTEIN. Well, the Souter hearings were actually very informative on that because Souter kind of marked himself as a Justice Harlan type. Justice Harlan was the most conservative member of the Warren Court, who also believed in a kind of evolving notion of what the Due Process Clause was. And every Republican and every Democrat got a clue about what Justice Souter was like through those questions, which were about old precedents that weren't really anymore in play. There, you can get something.

Ms. GREENBERGER. Let me just say something also, Senator Schumer. I think one of the dilemmas that your question goes to is the fact that there was something behind why the nominee was presented to the Senate for confirmation.

The President and the administration had a reason for selecting this person, and if this is a person without a fulsome record, it becomes extremely difficult to really get a sense of that person's views on the full range of issues that are going to be of enormous importance.

Nobody is looking, as you pointed out, for a narrow litmus test, but judicial philosophy, approach to the courts are the most fundamental questions. And we have also all shown that by asking generalized questions, you don't get to the rub of where the real differences lie.

Chairman SCHUMER. I would go beyond that. I would say certain times, from what has been written, the nominee that is looked for is one who doesn't have a record.

Ms. GREENBERGER. Exactly.

Chairman SCHUMER. And somebody who has been on the bench for a long period of time and has ruled on so many things—they say, well, they will find something and they will go against them. And so you are getting a trend to get people who have less of a record, which I think is awful—not awful, but could have bad problems.

Ms. GREENBERGER. It is very problematic, and when there is so much that is hanging in the balance certainly with respect to the Supreme Court, as everyone has pointed to, with 5–4 decisions going in many different critically important ways, but with lower courts as well, I think that expecting that someone will be able to come before this Senate Committee saying that they can't be required to answer probing questions is correct on the one hand, but then they also can't expect that the Senators are going to vote to confirm them.

I know, Senator Sessions, you have asked probing questions sometimes. There was a district court nominee that you asked whether that person believed in a constitutional right to sleep in the parks, and did they believe there was a constitutional right to welfare, and what was their opinion of the California civil rights initiative. Those were probing questions.

Senator SESSIONS. I don't think I asked that.

Ms. GREENBERGER. Sorry?

Senator SESSIONS. I don't believe I asked some of those questions, the last one particularly.

Chairman SCHUMER. It wouldn't be wrong if you did.

Ms. GREENBERGER. "In your opinion, is the California civil rights initiative constitutional," was the quote that I had, in the context of trying to explore——

Senator SESSIONS. Well, that is a little different.

Ms. GREENBERGER. Sorry, then I mischaracterized it. Let me read it, then, again. "In your opinion, is the California civil rights initiative constitutional?" Well, that was in an attempt to explore your concerns about judicial activism, as you defined it. Those are philosophical judicial philosophy questions that I would expect, from some of the answers of Professor Presser or Bolick, they

would say those were too specific. And, of course, those were even posed to a district court nominee, far more constrained even than court of appeals.

Chairman SCHUMER. Do you think there is anything wrong with asking those questions? I don't.

Ms. GREENBERGER. I think that to the extent that there is this view on the part of Senators that they want to have some comfort about the judicial philosophy, as you did, Senator Sessions, in that context, it is up to the nominee to determine how much of an answer they can give. It is then in your province to decide whether you are comforted enough about their judicial philosophy, not only based on their answers but based on what else you know about them.

If they have no background, if they have no way your assessing what will happen when they get that lifetime appointment, when you have got so many stakes at issue, then I would say at this particular time, given where the courts are, given the stakes at issue, given the very extreme views of some of the nominees, given the model of Thomas and Scalia that has been presented as the driving force for selection by this administration, then I would submit it is actually the responsibility of each Senator to assure himself or herself about judicial philosophy. And if the nominee is reluctant to answer the questions, then the nominee has not assuaged those concerns in a way that deserves a lifetime appointment.

Chairman SCHUMER. Professor Tribe?

Mr. TRIBE. Yes, Senator Schumer. One thing that I was a little disturbed by is how abstract some of this is getting. When we talk about the nominee for the Supreme Court, I think we should keep in mind that in recent decades a fairly clear model has emerged for the path to the Supreme Court.

Back in 1954, in *Brown* v. *Board*, not one of the Justices who sat had previous judicial experience. That doesn't happen anymore, almost never. Of the current Justices, there is only one who, when first named to the Court, hadn't already developed a track record as a judge, and that is the Chief Justice. Everybody else, except for Sandra Day O'Connor, who had been on a State court, came through the farm teams of the circuit courts.

Despite the ability of the U.S. Supreme Court to reverse a decision of a circuit court, that is why I think instinctively this Committee recognizes that it better look carefully not necessarily at the particular philosophy of every single nominee to a circuit court, but the overall balance, because that corpus is in all likelihood where the next level is going to come from.

And when it does, there is an optical illusion that I would alert you to—I think you are probably aware of it—and that is when somebody comes here with a track record in a circuit court, already having been confirmed once, one of the arguments made by the allies of the nominee is what are you so worried about? You have already confirmed the person. The person has already been through the baptism of fire. And, look, they have only been reversed twice out of umpteen times.

Keep in mind, the U.S. Supreme Court reviews less than 1 percent of the decisions of the circuit courts. It has made clear that

a circuit court decision, even one it thinks is clearly erroneous, will not be reviewed unless there is a special reason, like a conflict.

So somebody who goes through that laundering process, in effect, can emerge smelling like a rose, almost never reversed, virtually never reviewed. And the person followed the law, here, here and there, and then sort of the robes come off, as it were. It seems to me that is an additional reason that you have to look at every available piece of evidence. How does the person answer various questions? What did the person write before becoming a judge? Those are all relevant.

It is odd to me that it should be problematic to ask a follow-up question about *Buckley* v. *Valeo*. Well, if it troubles you, what part of it troubles you? How would you approach the application of the Free Speech Clause to money? That that should be troubling to ask, when it would be perfectly OK for the person to have written an article about it or a treatise about it—I think the more you know from someone's writings, of course, the more trouble they may in because it is hard to write a lot without offending various people. But the more you have available, the more legitimately informed your judgment is, not because you have a litmus test—oh, he didn't answer right about part 2(b) on *Buckley* v. *Valeo*—but you need to know.

Chairman SCHUMER. Go ahead, Professor Volokh.

Mr. VOLOKH. Just a few basic principles that might be helpful here. One is that there is a certain area, it seems to me, of the tail wagging the dog here. There were 370-odd appointments by President Clinton to circuit courts and district courts, and two Supreme Court appointments. To say we should spend not just as much effort but as much time on the lower court judges because they might be appointed, I think would be a mistake. Likewise, it seems to me that you might very well say that we don't want to trench quite as much on the judges with specific questions if somewhat less is at stake, and there is much, much less at stake with lower court judges.

The second point is I think it is very easy to say, well, we will ask them a lot of questions, but none will become a litmus test. You are the politicians and I am just an observer of the process, but it seems to me it is often a lot harder to resist something becoming a litmus test than it might seem. You ask enough questions and enough groups will get galvanized about this and eventually a litmus test will very quickly develop.

Now, one possible answer is that is great, that is democracy in action and we want the interest groups to galvanize about it, not just Supreme Court Justices, but every circuit judges, maybe on every district judge; you know, more robust debate about legal ideas. That is one possibility.

Another possibility is you might find that not only does it become harder to appoint really illustrious people with long track records to the Supreme Court, it becomes also harder to appoint them to other judgeships. As a result, the quality of the judiciary ends up suffering, as well as the quality of the process, and the amount of time that you have to devote to it will dramatically increase.

Chairman SCHUMER. Ms. Greenberger and then Professor Sunstein.

Ms. GREENBERGER. Just a couple of quick points. I have to say, as intellectually stimulating and challenging as some of these discussions are, I don't think that what is at stake here is the ability to engage in robust debate or an intellectual exercise.

I think to the extent that there are individuals and organizations who speak out with respect to these nominations, it is because of their fundamental concerns about what is at stake. My organization actually has never opposed a lower court nominee. So in that sense, we have something in common with Mr. Bolick. But that is not to say that in the future when we are dealing with the burning issues——

Chairman SCHUMER. Both litigate before all these judges, so I can understand.

Ms. GREENBERGER.—that when we have these burning issues that we wouldn't speak out, and that people are not looking to speak out simply because of an interest in an ideologically challenging debate, but rather because their most fundamental concerns are at stake.

And I want to say just one other quick thing about lower courts as opposed to the Supreme Court and the kind of scrutiny involved. It is a matter of simple common sense that, of course, the most scrutiny, the most concern, the most at stake is with respect to Supreme Court nominees. That is obvious. However many they will be, they will not rival in number by any means the number of lower court judges that will come through, and their authority over the lives of all of us is far greater. But that is also not to say that lower court judges don't have enormous power and influence in people's lives, as well, and because they are not at the Supreme Court scrutiny is no longer warranted for them.

There have been a number of different comments made that I haven't been able to respond to, but with respect to a lower court nominee—and there was a discussion about *Roe* v. *Wade* and how could a lower court overturn *Roe* v. *Wade*; that is the province of the Supreme Court. Well, of course, that is true in one respect.

It took 8 years between the time that the Supreme Court established an undue burden standard for determining whether women's constitutional right to choose was being infringed improperly -that standard of undue burden is a very loose and very subjective standard that depends obviously on the eye of the beholder or the particular judge at issue. It took 8 years before the Supreme Court took another case just last year to determine whether particular State laws constituted that undue burden, and five Justices said that it did.

Professor Tribe responded to Professor Presser when he said, well, women's rights can be protected in other ways outside of the Federal courts; they could go to the State courts, they could go to the State government. Well, this is the 30-year anniversary of *Read* v. *Reed*, Ruth Bader Ginsburg's first great triumph which established that the Equal Protection Clause gives women a role and an ability to protect their rights under our Constitution in the Federal courts, and we are not left just to the State courts or the State government for that fundamental equal protection challenge.

Mr. Bolick mentioned the Virginia Military Institute case to say that the Supreme Court today is still upholding that right. Well,

Justice Scalia dissented from the Virginia Military Institute case, where the State of Virginia would have said no women need apply to this Institute; they don't have the kind of emotional oomph to be able to make it in those kinds of military settings. Fortunately, history has proven him wrong.

Chairman SCHUMER. Ms. Greenberger——

Ms. GREENBERGER. I just want to say, and I know I have taken a lot of time here——

Chairman SCHUMER. No. I just want to ask you a question.

Ms. GREENBERGER. But I do want to say that in the rule of reason about looking at and scrutinizing lower court judges and the role that they play, the fact that they will not be supervised by the Supreme Court as a practical matter, the fact that, in fact, we will have fewer and fewer splits in the circuits for the Supreme Court to review if we get that kind of uniformity, all augers for a very important and careful role by this Senate.

Chairman SCHUMER. Did you want to say something, Professor Sunstein?

Mr. SUNSTEIN. Well, we have been focusing a lot on the confirmation hearings, and you might say that more important is the kind of process and mutual understanding between the Senate and the President before the hearings get going. The hearings do have a kind of "gotcha" feel, and aside from the Bork hearing and maybe the Thomas hearing, it is hard to think of a hearing that really made much of a difference.

What happened with Breyer and Ginsburg was that President Clinton was assured that those who didn't want a left-wing judge on the Supreme Court would be fine with Breyer and Ginsburg, so they were centrists. What happened with Justice Kennedy was that President Reagan was pretty well assured that Justice Kennedy would be acceptable to the Senate.

With lower courts, with respect to what President Clinton did exactly, he didn't go appointing liberals, partly because some Senators, as you know, said off the record, no liberals, Mr. President. And he took that quite seriously, so we have a real mix of Clinton appointees.

Now, the simple suggestion is the hearings are important, but in terms of producing deference to Congressional prerogatives and appropriate intellectual diversity, much, much more important is the mutual understanding within the Senate and between the Senate and the White House before nominations are made.

Chairman SCHUMER. That is a good point. I would just put two caveats in there. One, we may be in the position where there is no consultation. There has been none up to now. There have been, what, 20 or so nominees? There has been virtually none. That was what the argument even before the Democrats got into the majority about the blue slips was all about, not to give every Senator a veto, but to bring the President and the White House to come and talk to us.

Second, I have a feeling there is going to be less than in the situations you have mentioned because the Senate is so narrowly constituted. Even if Senator so-and-so or a group of Senators said no conservatives, Mr. Presidents, put moderate conservatives, no hard-right conservatives, the President still might take the chance

and say, well, all I need to do is win two or three over from the other side to get it done. When it is a 55–45 or a 60–40 Senate, I think it lends itself more to that situation, whereas now we are on a precipice here now.

I have more questions, if the panel doesn't mind, but Jeff has been waiting patiently. I am going to leave for 2 minutes, give the questions to him, and then return to some when he is finished, if that is OK with everybody.

Senator SESSIONS. Well, it is difficult when you ask a person about cases if they have been involved in matters where they have written on it, or maybe written opinions on it. I think you are in a little bit better shape to probe as much as that person is willing to discuss. I think respect for that person would indicate that if they are troubled by the question, they don't have to answer it.

With regard to those questions, what troubles me is that if I am asked about campaign finance reform and the First Amendment, I might tell you I think A, B, C, D. But I get on the Supreme Court and somebody has submitted two powerful briefs and I sit down with two of the best law clerk brains, or three or four or however many they have, in America and we start tracing the history of *Valeo* and other cases and we go through this and you come out with an entirely different approach.

I have done that many times in my legal career. You ask me a question and I say that can't be so, and some lawyer comes in and sits down and says, boss, I am telling you, you know, look at this case, you forgot about this or that statute. So I think we have got to respect nominees in that regard.

I think it is unhealthy, Ms. Greenberger, to suggest that when the Supreme Court ruled one small part of the Violence Against Women Act unconstitutional on a sovereign immunity question, an important sovereign immunity question, that they were somehow against women. I think you may take that too personally.

Ms. GREENBERGER. It is hard to——

Senator SESSIONS. Let me finish. You have talked beyond your limit several times.

Ms. GREENBERGER. Sorry.

Senator SESSIONS. Let me just say I respect that view, but I think as a former Attorney General of the State of Alabama, I am aware of the great heritage of the sovereign immunity principle. The U.S. Congress, to my knowledge, cannot blithely overrule that by passing a statute.

It strikes me odd that our more liberal speakers are somehow now complaining that the Supreme Court would dare to overrule a Congressional act, when historically you have been much more supportive of that than the conservatives. But I guess on that question, I don't think it is activism if the Supreme Court, in fidelity to the Constitution, finds that a Congressional act violates that Constitution, which is the supreme law of the land.

Staff just quickly found the way Senator Hatch defined it. He defined it in more detail, but this is a good summary of it. He said the test was, with regard to qualification, activism. He said judicial activists do not abide by the law. "They are someone who makes law as a super-legislature and usurps power from the other two co-

equal branches." Well, that clearly is a disqualifying thing, if a judge would do that.

Mr. Presser, I agree with you that if a President says he is going to submit nominees who are going to follow the law, that is not a big threat to us. I guess the threat is when we appoint nominees who think they have the right to create law.

I would agree with you, Mr. Sunstein, and I have said this repeatedly. There were these people who believed that the Reagan-Bush 12 years were going to destroy the judiciary. It didn't. Conservatives told me all the time that these Clinton judges are going to destroy the judiciary, and they haven't. For the most part, we have had a pretty good bunch of judges over the last number of years.

We did have a confrontation over classical activism, in my view. I think the high-water mark of it was when Marshall and Brennan would dissent on death penalty cases, every death penalty case before the Supreme Court. They declared that the Constitution, under cruel and unusual punishment, declared the death penalty unconstitutional, whereas there are at least five, maybe more, references in the Constitution within the corners of the document itself to capital crimes, to being able to deprive people of life without due process. You could not do it, but you could, of course, with due process.

That, to me, was classic activism when you had two members of the Supreme Court prepared to rule on their personal, deeply held, which I can respect, view against the death penalty to the extent that they would really do it in the face of the plain language of the Constitution. So I think the courts are getting better. I think things are settling down. Whoever said that comment, I believe, is correct.

I think it is OK for a Senator to ask any question they desire, but I also think we ought to give consideration to the nominee with regard to their reluctance to opine on matters that they are not prepared to opine on or matters that they may be required to rule on shortly.

I am concerned about the word, and not really sure why we use the word "ideology."

Chairman SCHUMER. We are not; we are using "ideology."

[Laughter.]

Senator SESSIONS. Ideology. Mr. Cutler and I are in accord on that; I am glad that we have a Democrat and Republican that do.

That makes me nervous, and I would ask you, Mr. Tribe, on this, I know you care deeply about that Presidential election contest, and you argued it brilliantly. I appreciated very much your kind comments about Ted Olson, your adversary in that, who won and got to be Solicitor General. Things happen.

[Laughter.]

Senator SESSIONS. He certainly wouldn't have if he hadn't won, I am sure.

[Laughter.]

Mr. TRIBE. I think he was on the short list.

Senator SESSIONS. In your remarks, though, you raised some concerns in my mind when you suggested that there really is a dangerous illusion that we can ascertain the law, the Olympian ideal

that law can be above partisan politics. And you suggested pretty clearly that that is a dangerous illusion. I do think the good and decent American people believe judges rule on the law; they don't rule on politics.

Mr. TRIBE. Senator Sessions, I am sorry. I said nothing of the sort. I said I have spent 32 years battling those of my colleagues who think that law is nothing but politics. I said I profoundly believe that law is different, but I also believe law is not something that you can discover like a little robot. You have to think about it. Does the law, properly understood, invalidate a provision of the Violence Against Women Act, which, by the way, didn't involve sovereign immunity. It was a suit against a private individual. How do we understand the law?

I think you made a wonderful point when you said that when a nominee might answer a question saying, well, the way it looks to me now, here is what I think about *Buckley* v. *Valeo*, that shouldn't lead us to predict that for sure that is the way that person will forever think about it. If the person has got a brain, the person is likely to reflect on it.

Just as Robert Jackson once said on the Supreme Court when he took a position different from one he had taken as Attorney General, he said the matter does not appear to me now as it appears to have appeared to me then. That is a common phenomenon. It is not a confirmation conversion.

Some nominees will do what you suggest, namely they will say I would rather not talk about that because I might change my mind. That will tell you something about the nominee.

Senator SESSIONS. Or their mind may not be formed.

Mr. TRIBE. Right, but then you might ask them, OK, think about it out loud with me. How would you go about it? If they say I would rather not, then depending on where you are to begin with, that might lead you to think you don't know enough about them to confirm them, or you might admire them for their chutzpa.

But if the person does go along with you and answers these questions, hopefully you will realize that down the line, with law clerks and briefs and arguments and a different world, the thing might look a little different. It doesn't mean you shouldn't inquire about these things.

Senator SESSIONS. Well, I did sense in your written remarks a suggestion that—you quote here, "If we could only wave a magic wand and remove all ideological considerations from judicial selection on the part of the President making nominations and on the part of the Senate in the confirmation process, somehow the Olympian ideal of a Federal judiciary, once again above politics and beyond partisan reproach, could be restored. For several reasons, that is a dangerous illusion."

Mr. TRIBE. Exactly.

Senator SESSIONS. I think all of us on this side of the table, that side of the table, and every judge and lawyer needs to work on a daily basis to maintain public respect for law. Do you think that is a bit of cynicism in your comments?

Mr. TRIBE. No. I mean, in context, I don't have any problem with what I wrote. What I am saying is if the world were different, if we knew the President didn't care at all about the substantive ap-

proach of a person—what is his view of federalism, what is his view of privacy—a kind of lottery; let's take the most brilliant, most witty, most humane lawyer and then gamble. Then we would have not just moderates and mainstream people; we would have pretty far right and far left people. That is a kind of wonderful world. It might be a better world.

I am saying that is not our world, and the American people know it. They know that the President typically has a pretty good idea of the kind of judge that he or she would like.

Senator SESSIONS. But a judge that is restrained and principled and adheres to, as best he can consistently, or she, to the law as written—I think the people understand that. I think they understand that that is the kind of judge he might appoint. I think when Al Gore referred to the living Constitution, I think they knew what kind of judges Al Gore would appoint.

Mr. TRIBE. They think they know——

Senator SESSIONS. They are going to show less fidelity and they are going to feel more able to read into that document what they would like it to say.

Mr. TRIBE. Do you read States' rights into it, or do you read personal rights into it? Justice Scalia and many other Justices—and I have praised them for this—take a structural approach to the Constitution. They don't say that everything in there is written down in so many words. They draw inferences, and the question of what kind of inferences judges draw—are they more willing to draw inferences about a very powerful state or about personal autonomy—that tells you a great deal. But the generality about "do you follow the law," I am afraid, with all respect, Senator, is just a platitude.

Senator SESSIONS. Well, there is a degree to which certain people are less likely to expand the law than others, and I think that is what we deal with. A judge who goes too far in that act is, in fact, making law. When two members of the Supreme Court rule that the death penalty is unconstitutional and in violation of cruel and unusual punishment, they are acting as a constitutional convention, not as a Court.

Mr. TRIBE. I happen to disagree with those two Justices on that point, but not for the reasons you gave.

Senator SESSIONS. Well, we had two members of the Court saying that and we don't want any more.

Mr. TRIBE. But what you said, Senator Sessions—please, with respect, what you said was because the Constitution refers to capital punishment, those guys couldn't be right. But it also refers to lopping people's limbs off. It says no one shall be twice put in jeopardy of life or limb. Does that mean that we couldn't conclude it is unconstitutional to lop off people's hands? It is an open question. I just happen to disagree with them.

Senator SESSIONS. I don't think it was very open.

I would just say this, Mr. Chairman. This has been a fascinating hearing. We have had an outstanding series of panelists. We have raised some important issues. I believe it is very important that we adhere to a procedure here that does not subject a nominee to attack because they ruled one way or the other in a case. I believe we need to be very careful about asking their opinions on existing

matters that may come before them as a judge. I think that is at high risk.

I believe we ought to avoid ideology, whatever that means precisely. As Mr. Cutler said in his remarks, this would be contrary to the view of the established ABA in their 1996 article which he quoted in his remarks that he provided for us today. So I think we just have got to be careful.

Those of us who would like to see the President's nominees move forward—are we a bit defensive? Perhaps. We don't want to see the rules changed after being accused of being too hard on Clinton nominees, when 377 were confirmed and 1 not confirmed and only 41 left pending when he left office. That is not a record of objection to those nominees.

So we don't want to see this changed where we are in a circumstance where judges are criticized and call in to account and put in the middle of political turmoil and then find that they didn't answer the questions precisely right. That is what troubles me.

I look forward to working with you. You are a good lawyer and a good scholar, and I enjoy working with you and I hope that we can see these nominations move forward. You said that Senator Hatch didn't set hearings. He did have a hearing set on May 23. Senator Leahy asked him to delay that. We have now gone along further.

We have at least 107 vacancies in the Federal courts today. Last year, Senator Leahy was complaining about there were 67 vacancies. This is a first-rate group of nominees that has been sent forward. It is time for us to commence hearings on them. We are reaching, and will soon reach a real crisis in the judiciary. It has been said that about 60 vacancies is about normal, and we are getting close to double that and I believe we need to move forward on it. I hope Senator Leahy will do that.

Chairman SCHUMER. As you know, we can't move forward until we reorganize the Senate. That is what I was saying to Mr. Bolick. From the day the President was inaugurated to this very moment, our side—and I don't want this to be a partisan issue because that is not the purpose of this hearing, but our side hasn't had any ability to move hearings.

We have asked that we not be notified of a nominee and have a hearing the next day. I think that is perfectly appropriate. But right now, we can't do a thing. Senator Leahy has said it is his intention to move forward once the Senate is reconstituted. We are already having the ABA, which we believe should still be part of the process, look at the process, and we will move forward.

Senator SESSIONS. But other committees are having hearings on nominees and moving them forward. We absolutely could move forward. He has decided not to move forward. That is the fact.

Chairman SCHUMER. But we are not reconstituted as a Senate and as a Committee as of yet, and I don't think it is unreasonable for him to say let's do that.

In any case, can I go back to some of the issues here? Senator Sessions and I have always gotten along well. We work well on quite a few issues together. We disagree on quite a few, as well, but we have always tried to be fair to one another, and I promise you that that will continue.

Let me just ask a generic question because maybe I—again, I agree with you, Professor Sunstein, and I agree with Ms. Greenberger. The questions we ask are not going to make people's sole judgment. It depends on how big the record is. It depends on how much consultation there is ahead of time. There are certain questions that I would want to ask somebody who comes to my office, which the nominees do, that I might not ask them publicly. It is a whole process.

But what I have found so disconcerting in the last decade are two things. One, we avoid the subject like it is naughty, and I don't think we should and that is one of the reasons this was the first hearing that we have held on this issue. In fact, I think it is an obligation to ask these questions, whether we have the views of Professors Presser and Volokh, and Bolick, or of Professors Tribe and Sunstein, and Greenberger.

It is our obligation to do it and it is an important part of the record, and I intend to do it. It will not be totally dispositive with me.

Senator SESSIONS. I wish you had been advocating that with Clinton nominations.

Chairman SCHUMER. Well, I did. I did ask a lot of questions of Clinton nominees. I was only here the last 2 years. I might add that in those 2 years, the percentage of nominees that went forward was much lower than in the previous—the percentages I have are, of all judges, the 106th Congress was the lowest on record since the 97th, which is how far back I go, 62 percent, and circuit 44 percent. That was a lot lower, but that is for a different day.

Let me ask you this, generally. You forced me to bring it up, Jeff.

Senator SESSIONS. You force me to reply.

Chairman SCHUMER. Yes, OK, you can.

But the question I wanted to ask you is this: is there anything wrong with asking potential nominees their views of already established cases and what they think of them and where they might agree and disagree? Does anyone think that is inappropriate?

We will have another hearing on this, but in my judgment, there is an affirmative burden on a lifetime appointee, particularly a Supreme Court lifetime appointee, to answer those questions, provided it doesn't interfere with a specific case that is coming before them. But I will even tell you there, I give the benefit of the doubt.

If there is a possibility, say, on the issue of gun control that somebody would eventually say that the Second Amendment means that you have—I will take a different one—that the Commerce Clause, because that is a more likely one——

Senator SESSIONS. Professor Tribe agree on this one, I think.

Chairman SCHUMER. Right, that the Commerce Clause allows national gun registration. Now, that is a potential case that might come up. But I would still feel, given my views, that it is an important thing I want to know about in terms of asking a potential judge their view.

Is there anything wrong with asking that?

Mr. BOLICK. Senator Schumer, I would note that in terms of asking about existing cases, a potential judge's——

Chairman SCHUMER. That is not an existing case right now.

Mr. BOLICK. Or past precedents. A judicial nominee's proper response, in my view, is in all instances that the doctrine of stare decisis compels that judge to accord appropriate respect to that.

Chairman SCHUMER. Well, let's say it is a Supreme Court nominee.

Mr. BOLICK. The problem is that when the nominee begins to invest that decision with nuances, that judge is getting in almost all instances to issues that may not have been decided within that decision. Other than saying, yes, I agree with it or, no, I disagree with it, once that judge starts getting into nuances, that judicial candidate is getting into dangerous territory.

Now, you noted that Ms. Greenberger and I play a different role in this process than some other groups, and one of the things that we do is when we have an important case before a judge is to look at that judge's record very, very carefully. And to the extent that a judge—even take campaign finance, for example, *Buckley* v. *Valeo*. A lot of those issues are still on the table, still unresolved, coming back to the courts once again.

I as a litigator would look at a judge who has taken a position on any of those matters and do a recusal motion if the judge had taken a position during a confirmation hearing that seemed to prejudge any aspect of a case that I was going to be bringing before that judge.

Chairman SCHUMER. But existing judges have taken—I mean, my questions would be no different than the questions that judges on the bench already are forced to answer all the time. Yes, it would be a recusal motion if somehow I came up with a hypothetical that was exactly or almost exactly the same as the case that you would litigate, but the odds of that happening are next to none.

Mr. BOLICK. I would way a judge in a very difficult position and should be very, very constrained because the kinds of broad principles that that person is articulating could, in fact, be exactly the case that is coming up and the judicial system requires an appearance of impartiality. So I think the further you go on that continuum, even beginning with cases like *Buckley*—I think *Buckley* is a great example because *Buckley* is constantly being litigated—it is dangerous territory.

Chairman SCHUMER. Professor Tribe?

Mr. TRIBE. I respect Clint Bolick, and he and I happen to agree on a few things, but this particular thing that he is saying, which I have heard other people say, completely baffles me.

Chairman SCHUMER. Me too.

Mr. TRIBE. Justice Scalia, for example, whom I respect a lot even when I disagree with him, was a professor at Chicago. He wrote lots of articles. Those articles took positions on various issues that he then had to rule on as a judge on the D.C. Circuit and now come before him in one way or another as a Justice. And sometimes, just as Senator Sessions pointed out, from a different vantage point he might change his mind somewhat.

It seems to me that you are better off, not worse off, when you know from someone's writings or testimony where that person is coming from. Do you think these people who haven't written about

something have blank minds, that they have no ideas? No. You just don't happen to know their ideas.

Now, if, when they wrote something down or answered questions, they were, in effect, committing themselves as to how they would eventually vote when the case comes before them, that would be disqualifying them. Anybody who would make that kind of commitment shouldn't be a judge.

But let's draw a distinction between the disqualification that comes from having, in effect, committed yourself in advance to a position, which I think is understandable, and the alleged disqualification that comes from having been transparent about something, which I think is completely incomprehensible.

Chairman SCHUMER. It makes sense.

I am just trying to flesh you out on this, Mr. Bolick, but in 1994, admittedly with a different President, you wrote in an article—it was about "Bork-ing" and the article is in the ABA Journal of 1994. You wrote, "Meanwhile, Senators should demand answers from both judicial and executive branch nominees. Though it is inappropriate for potential judges to say how they would rule on specific cases, their jurisprudential views on past decisions are relevant and proper areas of inquiry." I couldn't have said it better myself.

Mr. BOLICK. Well, Senator, I think that what I am saying is you can ask the question about *Buckley* v. *Valeo*. *Brown* v. *Board of Education* is probably a much easier example.

Chairman SCHUMER. That is why I didn't want to give that.

Mr. BOLICK. Right, but when issues are live, on the table, it is dangerous to ask and dangerous to give those answers. I could imagine you, not in the context of a specific past precedent, but, for example, asking, do you think school choice is unconstitutional or constitutional. If someone were to answer that question, I would act very aggressively to make sure that that person was not involved—not just in an academic musing, but before this committee, I would act very aggressively to make sure that that person was not sitting on a court that I had a school choice case in front of. And if that person were, the opinion, I believe, would not be respected by the public because that person had pre-judged it.

Chairman SCHUMER. Then we are getting back to what Mr. Presser first said and then backed off that maybe we shouldn't have hearings, and then the advice and consent becomes a rubber stamp. And it is not the hearings; I don't care about the hearings. I don't care how this comes out. You know, it could be questions that the President asks, and this hearing has convinced me further that having these kinds of issues out there is important.

It is not the sole determination, just as there is no litmus test on even any specific issue. But I think we have messed ourselves up by having this shibboleth that this stuff doesn't matter.

Ms. GREENBERGER. I also want to draw a distinction between filing a recusal motion and a judge feeling as if he or she needs to recuse themselves from a case. Filing a motion isn't dispositive.

Chairman SCHUMER. Professor Sunstein and then Professor Volokh.

Mr. SUNSTEIN. I do think things are simpler and more agreed on than some of the last few minutes suggest. Of course, you can ask any question you want, and then it is up to the nominee to decide

how to answer. And if the nominees says, I am sorry, I feel any answer would be to pre-commit myself and would be inappropriate, then you are perfectly entitled to take that into account.

I don't know that anyone disagrees. I think some of the detail has gotten away from that broadly sensible way of proceeding.

Chairman SCHUMER. Right, but you would also say—and this is where people would disagree, but to me, at least, asking, say, about the *Buckley* v. *Valeo* case and getting sort of nothing, you know, sort of what Mr. Bolick said, that should legitimately enter into my evaluation of whether this nominee deserved to get to the bench. I think that is where we have a——

Mr. SUNSTEIN. I think you are right, and if the nominee said I think *Buckley* v. *Valeo* should be overruled and I won't respect it as a lower court judge, that would be entitled to consideration, also. Any answer.

Chairman SCHUMER. Professor Volokh?

Mr. VOLOKH. Senator, actually I do think that the question you ask is a very tough question. I don't know to what extent it is proper to even ask point blank, what do you think of this decision and how would you vote in the future. There are certainly arguments for it, but it seems to me important to recognize that it is not the same as just looking at what this person has written as a scholar.

Somebody who is elevated to the bench can say, look, you know, sure, I wrote this law review article, but that was a law review article and now I have changed my mind. It is, I think, a lot tougher when somebody is testifying under oath in a situation where a decision about their future career was going to turn on this. There is always the fear that they will say, when I say I have changed my mind, people will misperceive that and will think that, in fact, I wasn't being quite candid before the Committee earlier.

I think a good example of the implication of that is you read back to Mr. Bolick an earlier article that he had written, and I think that is a powerful way of arguing. Imagine this had been sort of testimony that he had given. I take it that he would feel in a much tougher position explaining how it was that he——

Chairman SCHUMER. But, Professor Volokh, the purpose of this process, and I would say the Founding Fathers' purpose relates ultimately to the responsibility to the people, not to the potential judge and to the point that this person, he or she, may be put in an embarrassing position or be put on the spot.

As has been said by almost everyone here, it is a lifetime appointment, and I think my 19 million people in New York and the 260-some-odd-million Americans are entitled to know quite a bit, and I would agree with the Supreme Court more than the lower courts, but even with the lower courts to have some degree of understanding.

Mr. VOLOKH. Senator, of course it is about the people. The question is, and I think it is genuinely tough question, to what extent are the people entitled to have judges who have not found themselves put in a position where they are essentially -no matter how exactly they might put it, but where they essentially feel they are pre-committing themselves under oath.

Chairman SCHUMER. We may get tautology here. I would argue to you if we discussed so-called ideology openly, it would be better

for those nominees because they would be—and I think we would come to much more of an agreement here. They would be less "gotcha," there would be less trying to nail somebody for something, and I think the American people would have a better understanding and better respect for the bench. That is at least my preliminary view.

Professor Presser?

Mr. PRESSER. A very quick comment because I have to run to catch a plane, but it seems to me that whatever you need to determine a nominee's judicial philosophy ought to be fair game. But one of the points that you made very early on that we haven't talked about that we really should say something about is the notion that anybody who comes before the Judiciary Committee has a presumption against them that they have to overcome. Those weren't the words that you used, but the——

Chairman SCHUMER. We are going to have a hearing to decide if that should be the case or not.

Mr. PRESSER. The implication is that you are guilty until proven innocent, and that wouldn't be the kind of deference to the executive branch that I think you want to have.

Chairman SCHUMER. Right. I would not characterize it that way. The question is should our purpose be to find disqualifiers or should there be an affirmative case that has to be made by the nominee that he or she should be on the bench. I think that is going to be a very interesting hearing.

Mr. BOLICK. Senator, some of us have to defer to airline schedules.

Chairman SCHUMER. OK. Well, then let me, in conclusion, thank every one of you for being here. I think this has been a tremendously important hearing that is going to make all of us think a great deal as we move forward in this process.

Senator SESSIONS. Mr. Chairman, I would just like to add a thank you for your cooperative spirit, and your staff who has worked well with us on it. I would just add that every Senator, of course, can pursue matters as aggressively as he or she chooses. I guess one of the things that is troubling us is how far should we go, No. 2. And, No. 2, I wish we could think of a better word than "ideology," however we pronounce it, because this Miller Report condemns the use of ideology.

It deals with partisanship or political philosophy, and I voted for a lot of people whose politics are quite different from mine. But I believe they would follow the law, so I followed their legal philosophy, not their political agenda.

Chairman SCHUMER. Well, that is a great suggestion and we will take it up.

I want to ask unanimous consent that the statement by Senator Thurmond be added to the record.

The record will kept open for 1 week for any additional material to be submitted.

With that, we adjourn with profound thanks to all of our witnesses.

The hearing is adjourned.

[Whereupon, at 2:37 p.m., the Subcommittee was adjourned.]

THE SENATE'S ROLE IN THE NOMINATION AND CONFIRMATION PROCESS: WHOSE BURDEN?

TUESDAY, SEPTEMBER 4, 2001

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:07 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Charles Schumer, Chairman of the Subcommittee, presiding.

Present: Senators Schumer, Durbin, Sessions, Hatch, Thurmond, Kyl, and McConnell.

OPENING STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Chairman SCHUMER. The hearing will come to order. On behalf of the Subcommittee and Senator Sessions and myself, we would like to welcome everybody to the second in a series of hearings that the Subcommittee on Administrative Oversight and the Courts is holding to examine the judicial nomination and confirmation process.

Our first hearing examined the role of ideology in the Senate's consideration of judicial nominees. By the hearing's close, I think we showed that an open, honest and above-board consideration of a nominee's judicial ideology ultimately benefits the Senate and the nominee by keeping the inquiry focused on issues of substance rather than falling prey to the type of "gotcha" politics that has unfortunately emerged over the past two decades.

We also showed that openly considering judicial ideology benefits the judiciary itself by helping ensure that our courts remain balanced and moderate and represent the views and beliefs held by the majority of the American people.

Today, we have another opportunity to shed more light on the judicial confirmation process. In recent history, both Republican and Democratic Presidents have nominated controversial candidates to the bench. The confirmation process for many of these candidates has been tarnished by allegations of unfair treatment of the nominees by both sides, Republicans and Democrats.

It is time to clean up what has all too accurately been called the "confirmation mess." That is why we are holding these hearings, to look at what the process has become and talk about how to turn

it into something that treats both the nominees and the Senate with dignity and respect, and ensure that the Federal bench receives the very best candidates our Nation has to offer. It is an appropriate time to do this, before our full Committee and this Subcommittee get caught up in Supreme Court nominees and the thicket and maelstrom that that may produce.

Today, we take our next step toward that goal. We have invited a series of distinguished witnesses from across the political spectrum to come and discuss the Senate's role in judicial nominations and confirmations. During today's hearing, we will explore and hopefully answer one simple yet important question: On whose shoulders should the confirmation burden rest? Should the Senate ask itself, why shouldn't we confirm this nominee, or should the Senate ask the nominee, why should we confirm you?

The former puts the burden of proof upon the Senators, requiring them to either rubber-stamp the nominee or uncover evidence, often in the vein of "gotcha" politics, showing why the nominee is unfit for nomination. The latter puts the burden of proof on the nominee, requiring the nominee to demonstrate, based on his or her experience, qualifications, background, judicial ideology and writings, among other factors, why he or she merits a lifetime appointment to the Federal bench. The difference is subtle yet profound, impacting both the overall quality of the judiciary and the future of the advise and consent process.

As I so often learn, the best way to figure out what to do next is often by looking back at what the Framers did first. When the Framers debated how to fill judgeships on the Federal bench, they considered a wide range of possibilities. The options went from vesting all power in the Senate to giving the President unilateral authority to appoint judges.

According to the records of the Constitutional Convention, some delegates were concerned that the President might use the appointment power to put only his friends and like-minded thinkers on the Federal bench. So the Framers acted wisely. They chose a middle course that balanced power between the President and the Senate. The President was given the ability to nominate, but the Senate was given roles of offering advice in nominations and deciding whether to consent to those nominations.

In Federalist 77, Alexander Hamilton, a great New Yorker and a proponent of a powerful presidency and executive branch, lauded this balance of power. He noted that the very purpose of the Senate's role is to "restrain" the President as he exercises the nomination power. Hamilton foresaw an active Senate examination of judicial nominees, where blame would lay at the Senate's door if qualified nominees were rejected, but where credit would be given to the Senate when undeserving nominees were justifiably denied confirmation.

What does that mean? To me, it seems clear that the Framers wanted the President to select candidates for the bench, but that they also wanted the Senate to actively deliberate whether those candidates are fit for the bench. And I know that several of my colleagues, including the distinguished Minority Leader, Senator Lott, and my ranking colleague, Senator Sessions, the Ranking Member

of this subcommittee, have made similarly strong statements in favor of a very active Senate role in the confirmation process.

Given the stakes at hand, it makes sense that the burden should rest with the nominee. We require parties who appear before a court to prove their case. It is not unreasonable to ask those who come before the Senate seeking a lifetime appointment to the Federal bench to do the same.

Imagine a job interview where you walk in and it is up to the interviewer to either automatically hire you or find something in your past that disqualifies you. Provided you just sit there with your mouth shut, or at the very most voicing meaningless platitudes, and as long as there is no major skeleton in your closet, you are a shoo-in for the job. Is that the best way to find the best person for the job? Of course not. Any company built that way would be filing for Chapter 11 in months, but here in the Senate we sometimes call that the judicial confirmation process. And here in the Senate, the nominee gets the job for life.

Our system is on the verge of being broken and it needs fixing. The Founders, from Federalists like Hamilton to Democrats like Madison and Jefferson, would be shocked if they saw what was happening today. The Federal bench should be filled with the best and brightest legal talent. When the screening board is merely charged with asking itself why not this nominee, we can never hope to achieve the level of excellence the Framers intended and the American people have the right to expect.

When two co-equal branches of government are given balanced roles in a system, as is the case with judicial nominations and confirmations, the Senate cannot simply presume that the President's pick merits confirmation. A mistake here doesn't last just 2, 4 or 6 years, as it does with elected representatives; a mistake here lasts a lifetime. That is why it is our duty to ask every nominee "why should we," instead of asking ourselves "why not."

What does that mean for the President's nominees, this President's or any other? It would mean that they can expect to be treated fairly, but questioned rigorously. It means that they will be respected, but not rubber-stamped. It means that they will not be ignored, but they will also not be rushed.

Of course, saying the burden should be on the nominee doesn't answer the question of what the nominee should have to prove. At our first hearing, we established that ideology has been, is, and in my judgment should be a part of the inquiry. But other factors, such as diversity and political climate of the day, should be considered, too.

One factor that some of our witnesses focus on in their written testimony is the question of experience. By experience I don't just mean legal experience. We are talking more broadly about the importance of real-world experience, political experience, governmental experience. We are talking about the range of experience that we need to make the bench representative of and better able to understand America.

As Professor Tushnet points out in his testimony, the real-world experience of Justice Thurgood Marshall, the executive branch experience of Justice Byron White, and the national experience of Louis Brandeis all helped them make substantial contributions to

the Supreme Court's understanding of important national issues, even though those experiences weren't solely in the courtroom. Some of our witnesses today will help provide a historical context for placing the burden of proof on the nominee. Others here will surely disagree, and that is what makes these hearings interesting.

Before I turn to our ranking member, Senator Sessions, for his opening statement, I want to remind everyone that our third hearing, which will be held in the coming weeks, will examine the new federalism and the recent trend in Federal courts of limiting Congress' power to pass laws that affect people's everyday lives in important ways.

In conclusion, I want to thank Senator Sessions for again helping make this hearing a fully bipartisan hearing. We have had an equal number of witnesses and I have tried, as Chair, not to interfere with who Senator Sessions would think would be best to answer these questions. I look forward to continuing in this mode of productive bipartisanship.

You and your staff, Jeff, have helped us get this hearing scheduled in a short timeframe and have been a real pleasure to work with.

I now call on Senator Sessions for an opening statement.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman, and I would like to say that you have been extraordinarily courteous and accommodating as we work through these issues. I think it is fine and appropriate that we have hearings to discuss these issues. It is an important matter.

Basically, it is an important matter for each individual Senator because each Senator will have their own standard for what they believe should be the test for a nominee, whether or not they should be confirmed individually, and we have had different ones in the past and we will have different ones in the future.

I also appreciate your concern over the "gotcha" politics, having seen that firsthand and seen it over the years. I don't think that is a healthy way to go about the process. Some have said, well, they do that because they don't want to confront a person's philosophy. And I think you are saying, well, let's just talk about the philosophy more openly, and maybe that has validity. I think we just must be cautious how we go about it.

It is a difficult thing to analyze a nominee and say, well, we don't agree with your politics, therefore you are not a good nominee. I think that is an unhealthy approach. It rejects the concept which I as a practicing attorney in Federal court full-time for almost 15 years saw, which was on a daily basis all over America judges are making decisions based on law and facts and not on politics.

We in this body seem to think politics trumps everything and that you can't remove politics from it. But the truth is justice goes on in this country on a daily basis based on law and facts, and politics does not enter into it. I think it would be dangerous if we as a Committee were to suggest that a nominee who is a conservative or a liberal wouldn't be qualified because of their political views

when, in fact, day after day they both, as good lawyers and good judges, would probably rule the same way.

We will examine the role of the Senate today in the nomination and confirmation process. The Constitution simply states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint...Judges of the Supreme Court, and all other Officers of the United States..." Thus, the Senate has the duty and responsibility to advise the President on judicial nominees.

I am glad to see that President Bush is consulting with Republican and Democratic Senators from each judicial nominee's home State before the nominations are made. I think that is a healthy thing and I believe it will eliminate some difficulties that might otherwise occur. President Clinton's people talked with me normally before a nomination came forward in the State.

Once the President forwards a nomination to the Senate, Article II, section 2, clause 2, of the Constitution empowers the Senate to confirm or reject a nominee. It does not provide a standard for doing so. While the Senate has a great deal of latitude in exercising the power to confirm, it has the duty to exercise that power in a responsible manner.

One of the responsibilities is the manner in which the nomination hearings are conducted. Senator Hatch, to my right, while he was the Chairman of the Judiciary Committee, examined each nominee's integrity, qualifications, temperament, and approach to the law. While Senators sometimes disagreed on these issues, Senator Hatch is to be commended for not carrying out "gotcha"-type hearings to attack judicial nominees of the Clinton administration. This practice, I believe, panders to special interest groups at the expense of fairness in the hearings. If there was a personal issue, Senator Hatch usually would handle that privately. Senator Hatch elevated the confirmation process, and I believe justice in America benefited from it.

Another responsibility of the Senate is to confirm enough judges to assure the proper functioning of the judiciary. A judiciary cannot function without judges, and this is usually measured by the number of nominees, though we too little talk about it. President Clinton left office with a Republican Senate and there were just 67 vacancies, only 4 more than when the Democrats controlled the Senate in 1994. I believe that we did a pretty good job of moving nominees forward; in fact, a very good job of moving nominees forward. I think this Senate now, with a Democratic majority, is going to be challenged to meet that record.

Another responsibility of the Senate is to examine the record of each nominee to ensure they are qualified, have integrity, have judicial temperament, and will follow the law as written and as intended. If a nominee's record indicates that they lack those qualifications or will not follow the law, then the nominee, whether liberal or conservative, Republican or Democrat, should not be confirmed.

That the Senate is not a rubber stamp does not mean that it should be an aggressive co-policer, co-nominator, with the President of the United States. We have heard much about the need for the Senate to return to its historic role of aggressively defeating ju-

dicial nominations. It is true that during the first 100 years of our country's history, a number of nominees to the Supreme Court were not confirmed. The reasons why, however, have not been clearly explained. Many nominees declined to serve because of the Court's lack of prestige at that time, and others were not confirmed due to the lame duck or near-lame duck status of the nominating President.

In fact, only a very few were rejected because of what might be called their ideology. Thus, the impression that the Senate, as one witness earlier had said, took an early, vigorous role in policing the ideology of the Court or in making nominees bear the burden of proving their moderation in order to earn confirmation, is not borne out by the facts.

If history is to serve as a guide, we would do well to examine it with respect to the burden, or lack thereof, on nominees to prove their worthiness of confirmation beyond their paper record. During the first 130 years of our country, the Senate did not ask nominees any questions at hearings, probing or otherwise. The first nominee to even appear before the Senate was Harlan Fiske Stone, in 1925, and nominees did not appear regularly before the Judiciary Committee until John Marshall Harlan II, in 1955.

Occasionally, the Committee asked a few nominees questions in writing, but there was not probing examination and cross-examination in committee. It would therefore be difficult indeed for a nominee to bear some burden—illusory burden, I would suggest—of earning confirmation to submit to vigorous cross-examination and to personally convince Senators on the Committee that he or she truly meets the criteria in a way not reflected in that nominee's record, if indeed the nominee was not present at the hearing or there was no hearing.

Further, to place the burden on President Clinton's 377 nominees who were confirmed by this Senate would have been a logistical impossibility. To make each one prove their worthiness beyond their record as reflected in the files and forwarded to the committee, beyond the ABA rating, beyond the FBI background check, beyond the support of their home State Senators, would create an unprecedented logjam.

Generally, nominees are asked general questions and then confirmed without having to prove their worthiness by long statements or extensive cross-examination or production of philosophical documents. As a general matter, the history and practicalities of the appointment process make it very unlikely that the burden should even be on the nominee to prove his worthiness for confirmation. Thus, the presumption in favor of confirmation is a historical and practical necessity.

Moreover, shifting the burden to the nominee, when combined with policing for, let's say, conservative views, would, of course, place the Republican nominees in a catch–22. On the one hand, the Democrats would say that they would vote against the nominee if he answers questions in a manner that shows he is conservative. On the other hand, they could then say that they would vote against the nominee if he refuses to answer questions because he hasn't borne the burden. This catch–22 would not be a healthy thing, in my view.

So under the broad guidelines of the Constitution, a Senator can ask a nominee any question and a nominee can answer in any way he chooses or not at all. And while the Senate is not a rubber stamp, we owe to the institution of the Senate not to degrade the advice and consent process to the point of partisan bickering that could politicize the Federal courts. That was the testimony we had earlier in one of our previous hearings.

We don't need a double standard for confirmations. We need the same standard that former Chairman Hatch used with President Clinton's nominees, one of deference to the President and respect for the nominee and respect for the non-political rule of law.

Mr. Chairman, thank you, and I ask that my full statement be made part of the record.

Chairman SCHUMER. It will be made part of the record.

[The prepared statement and an attachment of Senator Sessions follows:]

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

While I welcome this review of the Senate's constitutional advice and consent responsibilities, I am concerned that if a new higher standard for confirming Republican judicial nominees is adopted it will degrade the Senate's role in the appointment process.

CONCERNS

On April 30, 2001, at a private retreat, Laurence Tribe, Cass Sunstein, and Marcia Greenberger lectured Democratic senators on how to block Republican judicial nominees by "changing the ground rules." Neil A. Lewis, *Democrats Readying for a Judicial Fight*, N.Y. TIMES, May 1, 2001. Then on June 26, 2001, Tribe, Sunstein, and Greenberger were invited to testify before this subcommittee at a hearing entitled, "Should Ideology Matter? Judicial Nominations 2001." They argued, in effect, for a higher standard for confirming Republican nominees than was used to confirm Democratic nominees.

The higher confirmation standard is justified, according to Tribe, Sunstein, and Greenberger, because, they insist, Clinton appointed no liberal judges (they really said that) and that as a result the courts are to the "right" of mainstream, and that the Republican Senate was unfair to President Clinton's nominees. These justifications for a higher standard do not survive close examination.

First, President Clinton certainly appointed liberals to the courts. Ruth Bader Ginsburg was the general counsel to the ACLU before she was elevated to the Supreme Court. Marsha Berzon was the head of the litigation section for the ACLU's San Francisco chapter before President Clinton appointed her to the Ninth Circuit. Certainly, these were "liberal" appointees.

Second, the Rehnquist Court is not far to the "right" of the mainstream and thus in need of "balancing" by "moderate" appointees. Indeed, the Rehnquist Court has protected burning the American flag, *United States* v. *Eichman*, 496 U.S. 310 (1990), banned voluntary student prayer at high school football games, *Sante Fe Independent School District* v. *Doe*, 530 U.S. 290 (2000), protected special rights for gays, *Romer* v. *Evans*, 517 U.S. 620 (1996), stopped the police from using heat sensors to search for marijuana growing equipment, *Kyllo* v. *United States*, 121 S.Ct. 2038 (2001), and reaffirmed and expanded abortion rights, *Stenberg* v. *Carhart*, 530 U.S. 914 (2000). Perhaps these rulings are far to the "right" of Tribe, Sunstein and Greenberger, but they are not far to the right of Middle America.

Third, despite reports to the contrary, the Republican Senate was not unfair to President Clinton's judicial nominees. To the contrary, the Senate confirmed 377 of President Clinton's nominees and left only 41 pending at the end of his tenure. This compares favorably to the 382 confirmations for President Reagan and the 54 nominees left pending at the end of the first President Bush's term.

Thus, the characterizations of President Clinton's appointees as wholly non-"liberal", of the Rehnquist Court as out of the "mainstream," and of the Republican Senate's treatment of President Clinton's nominees as "unfair" do not pass muster. To use these false premises as the justifications to impose a higher standard for confirming Republican nominees than that used to confirm 377 Democratic nominees would be wrong and seriously degrade the confirmation process. In my view, we do

not need to inject a stealth partisanship into the advice and consent process under the labels of "balance," "moderation," or "mainstream." Instead, the President needs to nominate and the Senate needs to examine and confirm qualified, fair judges who will follow the law.

THE NOMINATION PROCESS

At today's hearing, we examine the role of the Senate in the nomination and confirmation process. The Constitution simply states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court, and all other Officers of the United States . . . ." Thus, the Senate has the duty and responsibility to advise the President on judicial nominees.

Part of this responsibility is reflected in the tradition of senatorial courtesy which dates back to George Washington's Presidency. The input of home state senators is an important part of this process. I believe that the President should consult in good faith with home state senators prior to nominating a judge to a federal court located in that state. In my view, although the power to nominate belongs solely to the President, the President has the obligation to listen to home state senators before he makes his decision to nominate a particular person. I am glad to see that President Bush is consulting with Republican and Democratic senators from each judicial nominee's home state prior to making the nomination.

THE CONFIRMATION PROCESS

Once the President forwards a nomination to the Senate, Article II, section 2, clause 2 of the Constitution empowers the Senate to confirm or reject a nominee. It does not provide a standard for doing so.

While the Senate has a great deal of latitude in exercising the power to confirm, it has the duty to exercise that power in a responsible manner. One of the responsibilities is the manner in which nominations hearings are conducted. Senator Hatch, while he was chairman, examined each nominee's integrity, qualifications, temperament, and approach to the law. While senators sometimes disagreed on these issues, Senator Hatch is to be commended for not calling a series of nominations hearings at which panels of witnesses were called to attack judicial nominees. This practice inevitably panders to special interest groups at the expense of the nominee. If there was a personal issue, he handled it privately, thus saving the nominee and the nominee's family much anguish. His fairness and gentlemanly demeanor were a credit to the chair he held, to this Committee, to the Judiciary and to the Senate as a whole. He did not respond to the "Borking" procedures used against some Reagan and Bush nominees by doing the same. He elevated the confirmations process, and justice in America benefitted from it.

Another responsibility of the Senate is to confirm enough judges to ensure the proper functioning of the federal judiciary. A judiciary cannot function without judges. This is generally measured by the number of vacancies on the federal bench. At the end of each Congress during the Clinton Presidency, the number of vacancies on the federal bench was far lower than it is today:

Year	Senate	Vacancies
1994	Democrat	63
1996	Republican	65
1998	Republican	50
2000	Republican	67
September 4, 2001	107	

Though the media generally refuses to report it, when President Clinton left office with a Republican Senate, there were just 67 vacancies—only 4 more than when the Democrats controlled the Senate in 1994. Because of retirements, deaths, and the lack of confirmations, the number of judicial vacancies has grown to 107 since the last Congress under President Clinton adjourned. Thus, if no more retirements or deaths occur between today and the end of the year, we will need 40 more confirmations to match the number that the Republican Congress left President Clinton with last year. In the first years of the past three Administrations, all but one of the nominees who were nominated before the end of the August recess were confirmed *in the first year of the Presidency*. Thus far, the Senate has confirmed only 4 of the 44 nominations that President Bush has made prior to the August recess. We can do better.

Moreover, there are certain districts, like the Southern District of California, that desperately need new judgeships. I hope that the Committee can act in a bipartisan basis to create a moderate number of new judgeships where the caseload is the most egregious and the consistent administration of justice is at risk.

Another responsibility of the Senate is to examine the records of each nominee to ensure that they are qualified, have integrity, have a judicious temperament, and will follow the law as written and intended. If a nominee's record indicates that he or she lacks qualifications, integrity, a judicial temperament, or will not follow the law, then that nominee whether Republican or Democrat, liberal or conservative, should not be confirmed.

That the Senate is not a rubber stamp does not mean that its proper role is that of aggressive policer or even co-nominator with the President. In Federalist No. 76, Alexander Hamilton set forth the view of the Framers that "[i]n the act of nomination, [the President's] judgement alone would be exercised; and it would be his sole duty to point out the man, who with the approbation of the Senate, should fill an office."[1] Hamilton added that the Senate was to serve as "an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."[2] Moreover, he stated that the Senate should "not be tempted by the preference they might feel to another [nominee] to reject the one proposed."[3] Thus, the Senate should ensure that the President's nominees meet the criteria of qualification, integrity, temperament, and fidelity to law, and if they do, we should give deference to those nominees.

We have heard much about the need for the Senate to return to its historic role of aggressively defeating judicial nominations. It is true that during the first 100 years of our country's history, a number of nominees to the Supreme Court were not confirmed. The reasons why, however, have not been clearly explained. Many nominees declined to serve because of the Court's lack of prestige at the time and others were not confirmed due to the lame-duck or near lame duck status of the nominating President. In fact, only a very few were rejected because of their own ideology. Thus, the impression that the Senate took an early vigorous role in policing the ideology of the Court or in making nominees bear the burden of proving their moderation in order to earn confirmation is not true.

THE BURDEN

If history is to serve as the guide, however, we would do well to examine it with respect to the burden, or lack thereof, on nominees to prove their worthiness of confirmation beyond their paper record. During the first 130 years of our country's history, the Senate did not ask nominees any questions at hearings, probing or otherwise. The first nominee to even appear before the Senate was Harlan Fiske Stone in 1925, and nominees did not appear regularly before the Judiciary Committee until John Marshall Harlan II in 1955. Occasionally, the Committee asked a few nominees questions in writing, but there was no probing examination and cross examination in Committee. It would be difficult indeed for a nominee to bear some illusory burden of earning confirmation, to submit to vigorous cross examination, and to personally convince senators on the Committee that he truly meets the criteria in a way not reflected in his record, if the nominee was absent.

Further, to place the burden on President Clinton's 377 nominees who were confirmed by the Senate would have been a logistical impossibility. To make each one prove their worthiness beyond their record as reflected in the files forwarded to the Committee, beyond the ABA rating, beyond the FBI background check, and beyond the support of their home state senators would create an unprecedented logjam. Generally, nominees are asked a few stock questions and then confirmed without having to prove their worthiness for confirmation by long statements, extensive cross-examination, etc. As a general matter, the history and practicalities of the appointment process make it very unlikely that the burden should or even could be on the nominee to prove his worthiness for confirmation. Thus, the presumption in favor of confirmation is a historical and practical necessity.

Moreover, shifting the burden to the nominee when combined with policing for conservative views, would, of course, place Republican nominees in a Catch-22. On the one hand, the Democrats could say that they would vote against a nominee if he answers questions in a manner that shows he is conservative. On the other hand, the Democrats could say they would vote against a nominee if he refuses to answer

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[1] The Federalist No. 76, at 456–57 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
[2] Id. at 457.
[3] Id.

their questions because he hasn't borne his burden. This Catch-22 for Republican nominees was not used for Democratic nominees and should not be used for any nominees.

CONCLUSION

Under the broad guidelines of the Constitution, a senator can ask a nominee any question, and a nominee can answer any way he chooses or not at all. While the Senate is not a rubber stamp, we owe it to the institution of the Senate not to degrade the advice and consent process to the point of partisan bickering that could politicize the federal courts. We don't need a double standard for confirmations. We need the same standard that former Chairman Hatch used with President Clinton's nominees—one of deference to the President and respect for the nominee, and respect for a non-political rule of law.

Breakdown of the 20 Nominees "Rejected" out of the 85 Supreme Court Nominees Submitted Between 1789 and 1900

To support the use of ideology as a standard by which to confirm or reject the nomination of United States Supreme Court justices, some have asserted that between 1789 and 1900, 1 out of 4 Supreme Court nominees were rejected that such rejections arose in large part from the nominees' ideologies.[1] This statistic,[2] which is misleading, states that the Senate refused to confirm 20 out of 85 Supreme Court nominees. In actuality, 2 of the 20 nominees were eventually confirmed, 10 of the 20 were either rejected or not acted upon because they had been nominated by lameduck, or near lameduck, administrations, 4 were rejected for other reasons (*e.g.*, a senator wanted his favorites nominated), and only 4 of the 20 nominees were rejected on ideological grounds – primarily based on their personal political views. Because only 1 out of more than 20 nominees was rejected because of his ideology, a nominee's ideology historically played a minor or nonexistent role in confirmation, not a major role.

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[1] *See, e.g., Should Ideology Matter?: Judicial Nominations 2001: Hearings Before the Senate Subcomm. On Admin. Oversight and the Courts of the Comm. On the Judiciary*, 107th Cong. *9 (2001) (statement of Marci Greenberger) ("During its first hundred years, between 1789 and 1900, 20 of 85 Supreme Court nominees did not make it to the bench – they were rejected, withdrawn, or not acted upon. Between 1895 and 1969, during a period in which many Administrations did not use judicial philosophy as a driving selection criterion, just one nominee was rejected.")

[2] *See* JOHN MASSARO, SUPREMELY POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS ix (1999).

Actually Confirmed

Roger B. Taney[3]	Nomination was postponed, but confirmed a few months later. (1836)	In a power play between the Senate and President Andrew Jackson, Taney's nomination was postponed indefinitely by the Senate, but President Jackson re-nominated him, and Taney was eventually confirmed[4].
Stanley Matthews[5]	Not acted on under President Hayes, but later confirmed under President Garfield. (1881)	Matthews was nominated in the waning days of the Hayes administration, not allowing the Senate enough time to act, but he was renominated and confirmed under Presdient Garfield.[6]

[3]Even though Roger Taney was actually confirmed, Laurence Tribe characterizes the initial opposition he encountered as based on ideological grounds, namely his opposition to the National Bank. LAURENCE H.TRIBE, GOD SAVE THIS HONORABLE COURT 86 (1985).

[4]HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 74-75 (1999); THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 858 (Kermit L. Hall, ed. 1992) [hereinafter OXFORD COMPANION].

[5]While Stanley Matthews was also actually confirmed, Professor Tribe asserts that the initial opposition to him was due to his sympathy with business interests. TRIBE, *supra* note 3, at 89.

[6]ABRAHAM, *supra* at note 4, at 102-103; OXFORD COMPANION, *supra* note 4, at 533.

Not Confirmed Due to Opposition to the Nominating President

John J. Crittenden[7]	Postponed (1828)	Nominated in the last days of John Quincy Adams's lame duck administration; Andrew Jackson had already been elected.[8]
John Spencer	Rejected (1844)	The Henry Clay dominated Senate disliked Tyler and refused to confirm 5 of his 6 Supreme Court nominees. Spencer, was opposed due to his acceptance of cabinet posts under John Tyler. Accordingly, his nomination was defeated, but not based on his personal political or jurisprudential ideology.[9]

[7]John Crittenden's nomination is described by Laurence H. Tribe as having been postponed because Crittenden was a moderate Whig. TRIBE, *supra* note 3, at 31.

[8]ABRAHAM, *supra* note 4, at 70 ("Adams, now a lame-duck president, send Crittenden's name to the Senate late in December 1828. Yet victorious Andrew Jackson's Democratic supporters in that body were not about to award the Supreme Court plum to a Clay Whig and , without ever discussing Crittenden's qualifications *or his views*, by a vote of 23:17 'postponed' the nomination in February 1829, thus consigning it to oblivion.") (emphasis added); David J. Danelski, Confirmation Controversy: The Selection of a Supreme Court Justice: Ideology as a Ground for the Rejection of the Bork Nomination, 84 Nw. U.L. Rev. 900, 907-08 (1990) ("Crittenden's case may be a clear precedent for partisan rejection of lameduck nominations, but it is not a clear precedent for ideological rejection of Supreme Court nominees.").

[9]ABRAHAM, *supra* note 4 at 29, 79 ("[S[pencer] was an avowed political enemy of Henry Clay and his followers, and it was with more ease than the rejection vote of 21:26 indicated that the Clay faction succeeded in blocking Spencer."); OXFORD COMPANION, *supra* note 4, at 816 ("[T]he Senate rejected by a vote of 21 to 26, owing largely to the opposition of those Whigs who distrusted any friend of Tyler and to Spencer's fierce temper.").

Reuben Walworth	Withdrawn (1844)	President Tyler withdrew Walworth after the Senate postponed the nomination indefinitely. The Whig Senators were mistakenly confident that Henry Clay would defeat James Polk in the next presidential election, and that Clay would submit nominees more to their liking.[10]
Edward King	Withdrawn (1844)	President Tyler withdrew King after the Senate postponed the nomination indefinitely. The Whig Senators were mistakenly confident that Henry Clay would defeat James Polk in the next presidential election and that Clay would submit nominees more to their liking.[11]

[10] ABRAHAM, *supra* note 4 at 29, 79 ("It was now June, and the Whig Senators thinking they had victory in their grasp in the forthcoming presidential election, moved to postpone" both the Walworth and King nominations by votes of 20:27 and 18:29, respectively."); OXFORD COMPANION, *supra* note 4, at 908 ("Walworth's nomination suffered from Tyler's lack of support from either Whigs or Democrats.").

[11] ABRAHAM, *supra* note 4 at 79 ("It was now June, and the Whig Senators thinking they had victory in their grasp in the forthcoming presidential election, moved to postpone" both the Walworth and King nominations by votes of 20:27 and 18:29, respectively."); OXFORD COMPANION, *supra* note 4, at 486 ("Both the King and Read nominations failed as a result of Tyler's lack of support from either the Whig or Democratic party.").

John M. Read	Not Acted On (1844)	Although Read had Democratic and Whig support, the Senate adjourned without acting on his nomination because Read was nominated by Tyler and was nominated during the waning days of Tyler's lame duck administration.[12]
Edward A. Bradford	Not Acted On (1852)	When Bradford was nominated, the Senate was about to adjourn before the elections. Because President Fillmore was a lameduck, the Senate did not act on the Bradford's nomination.[13]

[12] ABRAHAM, *supra* note 4 at 80 ("[Tyler] nominated well-known Philadelphia lawyer with supporters in both the Whig and Democratic camps, a one-time U.S. attorney of proved legal acumen and political deftness, John Meredith Read. But it was now mid-February, and a weary Senate adjourned without acting on the nomination – thus handing Tyler his fifth failure. It was widely expected that the incoming President Polk would have more luck."); OXFORD COMPANION, *supra* note 4, at 709 ("[The Read] nomination[] suffered from Tyler's lack of support from either Whigs or Democrats.").

[13] ABRAHAM, supra note 4, at 83 ("Fillmore's first choice to succeed the late [Justice McKinley] was Edward A. Bradford of Louisiana, a well-known, able lawyer from the same circuit. The Senate, however, was about to adjourn and it was in no mood to expedite a Fillmore nomination. ... [I]t reconvened after Pierce's victory ...."); OXFORD COMPANION, *supra* note 4, at 81 ("The Democratic majority in the Senate failed to act on the nomination before the end of the session.").

George E. Badger	Postponed (1853)	President Fillmore was now a lameduck, and the Senate chose to preserve the nomination for the incoming president, Franklin Pierce. In addition, Badger drew some opposition because he was a North Carolinian and lived outside the 5th Circuit where the preceeding justice had resided.[14]
William C. Micou	Not Acted On (1853)	The Senate failed to act on another Fillmore nominee, preserving the Court vacancy for incoming Democratic President Franklin Pierce.[15]

[14] ABRAHAM, *supra* note 4, at 83 ("When [the Senate] reconvened after Pierce's victory, Fillmore named U.S. Senator George E. Badger of North Carolina on January 3, 1853. A conservative Whig who was not readily identifiable as either pro-slavery or anti-slavery, Badger was nonetheless a clearly committed Whig who had served as secretary of the navy in the Harrison and Tyler cabinets. The Democratic majority in the Senate was not about to deprive the victorious incoming President of the choice of his own man, even though rejecting one of its own members would be little short of political sacrilege."); OXFORD COMPANION, *supra* note 4, at 54 ("Badger's residence outside the fifth circuit aroused criticism from Alabama, Mississippi, and Louisiana senators, who preferred resident candidates.").

[15] ABRAHAM, *supra* note 4, at 83 ("Finally, lame-duck Fillmore turned back to Louisiana and to another well-known attorney, William C. Micou – law partner of U.S. Senator-elect Judah P. Benjamin, to whom Fillmore had offered the Court post, but who preferred to go to the Senate. ... Predictably, the Senate refused to act on Micou's nomination, and the McKinley seat remained vacant for the incoming Franklin Pierce to fill."); OXFORD COMPANION, *supra* note 4, at 545 ("The Democratic majority in the Senate, however, failed to confirm [Micou's] appointment. Within a month, the new Democratic President, Franklin Pierce, had appointed John A. Campbell.").

Jeremiah S. Black[16]	Rejected (1861)	Was nominated at the end of Buchanan's lame-duck term, and Republican senators wanted to hold the seat for Lincoln.[17]
Henry Stanbery	Not Acted On (1866)	After Andrew Johnson survived impeachment, the Senate was opposed to any Johnson nominees, and when a vacancy to which Stanbery was nominated arose, the Senate passed a bill that abolished the vacant seat and provided a proviso that when the next vacancy occurred that seat would also be eliminated.[18]

[16]Laurence Tribe characterizes Black's true liability as his opposition to abolition of slavery. TRIBE, *supra* note 3, at 88.

[17]ABRAHAM, *supra* note 4, at 29 ("Democrat James Buchanan's nomination of Jeremiah S. Black in December 1860, three months before his term ended, fell 25:26, chiefly because Republican senators wanted to hold the seat for Abraham Lincoln to fill."), 86; Danelski, *supra* note 8, at 910 ("The standard explanation that Black's defeat turned chiefly on the nomination's timing, Buchanan's loss of power, and Republican control of the Senate is more plausible. As in Crittenden's case, Black's party affiliation was far more important to his defeat than his ideology.").

[18]ABRAHAM, *supra* note 4 at 93 ("Vacillating for almost a year, Johnson finally chose Attorney General Henry Stanbery, and Ohio Republican of considerable legal skill and a well-liked public figure. But it is doubtful that the Senate would have approved God himself had he been nominated by Andrew Johnson. Not only did it fail to act on the Stanbery nomination, it also passed a bill that abolished the vacant ... set, reducing the Court's membership from ten to nine."); OXFORD COMPANION, *supra* note 4, at 818 ("Henry Stanbery's nomination fell victim to the bitter conflict between President Andrew Johnson and Republican leaders in Congress.").

Rejected on other grounds

George H. Williams	Withdrawn (1873)	Williams requested that the President withdraw his name. Williams had been attacked as being unqualified.[19]

[19] ABRAHAM, *supra* note 4 at 98 ("It was now November and Grant, realizing that he had to take some action, turned to his attorney general, George H. Williams of Oregon, an honest but only marginally capable individual. Williams's nomination ran into immediate flak from the bar, press, and public – all of whom quite rightly deemed William to be lacking in stature – but Grant persisted in pushing the 50-year-old lawyer until the Judiciary Committee approved his nomination. The full Senate, however, demurred, and the president withdrew Williams's name early in January 1874 at the nominee's own request."); OXFORD COMPANION, *supra* note 4, at 031 ("President Ulysses S. Grant's 1873 nomination of George Williams for the position of chief justice met with considerable controversy, arousing opposition in the Senate and among the organized bar that viewed Williams as too undistinguished for the nation's chief legal position. At Williams's request Grant withdrew the nomination.").

Caleb Cushing[20]	Withdrawn (1874)	Although qualified, his nomination was withdrawn by the President because of his age - he was 74 -, because he had made many enemies by switching political parties on a regular basis, and because he wrote a letter of recommendation for a former law clerk to Jefferson Davis. Cushing was rejected primarily because of his lack of political loyalty, not his adherence to a particular political or judicial ideology.[21]

[20]Professor Tribe acknowledges that Cushing's political unreliability factored in the withdrawal of his nomination, but posits that it was Cushing's pro-slavery views and correspondence with Confederate President Jefferson Davis that truly doomed his nomination. TRIBE, *supra* note 3, at 88.

[21]ABRAHAM, *supra* note 4, at 32 ("Cushing's age – 74 – was noted prominently during debate, but the real reason for his rejection was the Senate's not entirely erroneous belief that Grant's close personal friend was a political chameleon. Indeed, Cushing had been, in turn, a regular Whig, a Tyler Whig, a Democrat, a Johnson Constitutional Conservative, and finally a Republican."); Danelski, *supra* note 8, at 911 (reviewing numerous historical sources and concluding "[i]n view of these essentially nonideological interpretations, it is difficult to conclude with any confidence that Cushing's views on slavery were the principal cause of his defeat.")

William Hornblower	Rejected (1893)	President Cleveland's nominees were rejected because Senator David Hill was disappointed when Cleveland refused to select Hill's favored candidates and Hill convinced his fellow Senators to vote likewise when Cleveland nominated an enemy of Hill's friend.[22]
Wheeler H. Peckham	Rejected (1894)	President Cleveland's nominees were rejected because Senator David Hill was disappointed when Cleveland refused to select Hill's favored candidates, and Peckham had also been involved in a patronage conflict with Hill in which Hill was the loser.[23]

[22] ABRAHAM, *supra* note 4 at 108 ("[New York's] astute and powerful Senator David B. Hill advanced numerous suggestions to the president. But Hill was a member of an anti-Cleveland patronage faction in New York's Democratic party, at odds with the president on personnel matters, and the president refused to heed the senator despite of the letter's threats to invoke senatorial courtesy. When Cleveland thus proposed a conservative corporation lawyer and Cleveland loyalist, William B. Hornblower, to the Senate at the end of the summer, Hill, although with some difficulty, rallied his colleagues, and Hornblower went down to defeat 24:30 four months later."); OXFORD COMPANION, *supra* note 4, at 412 ("A year earlier, Hornblower, as a member of a committee of the New York City Bar Association, had conducted an investigation into an election irregularity, leading to the defeat of Isaac H. Maynard in a contest for a seat on the New York Court of Appeals. Maynard's powerful ally and friend, Senator David B. Hill of New York retaliated by leading a successful campaign to defeat Hornblower's nomination; the nomination was rejected by a vote of 30 to 24on 15 January 1894.").

[23] ABRAHAM, *supra* note 4, at 108 ("Not one to capitulate readily, Cleveland again ignored Hill's admonitions, and nominated another New Yorker of similar persuasions, Wheeler H. Peckham, that January. Following a month of debate, Hill's senatorial courtesy claims proved to be victorious again, this time by a nine-vote margin, 32:41."); OXFORD COMPANION, *supra* note 4, at 627-28 ("Peckham was opposed by Senator David B. Hill of New York because Peckham had become involved in a patronage squabble

Rejected on Ideological Grounds

John Rutledge	Rejected (1795)	Rutledge had actually already been appointed as an associate justice on the Supreme Court; only his nomination for the Chief Justice position was rejected because of his opposition to Jay's Treaty.[24]

between Cleveland and Hill, in which Hill was the loser. Hill invoked senatorial courtesy and the Senate voted 41 to 32 against confirmation on 16 February 1894.") .

[24] ABRAHAM, *supra* note 4, at 30 ("Rutledge had asked President Washington for the appointment on John Jay's resignation but now found his fellow Federalists voting against him because of his vigorous opposition to Jay's Treaty of 1794. The Federalist senators refused to confirm a public figure who actively opposed the treaty they had championed so ardently ...."); OXFORD COMPANION, *supra* note 4, at 751 ("Rutlege's nomination as chief justice was in extreme jeopardy even before Washington submitted it to the Senate. On 16 July 1795 Rutledge presided over a meeting in Charleston protesting the Senate's ratification of Jay's Treaty. Not content simply to lead the meeting, Rutledge delivered a lengthy harangue against the treaty and urged the president not to sign it. Outraged by his opposition to Jay's Treaty, a cornerstone of the administration's diplomacy, and concerned by the reports of his insanity, the Federalist majority in the Senate voted against Rutledges's nomination on 15 December 1795 by a vote of 14 to 10 ....").

Alexander Wolcott[25]	Rejected (1811)	Wolcott's nomination was rejected because of his vigorous enforcement of embargo and nonintercourse acts when he was a U.S. Collector of Customs.[26]
George Woodward	Rejected (1846)	Woodward was rejected because of his reputation as an extreme American nativist and because of divisions within the Democratic party.[27]

[25]While Abraham lists qualification as a side-issue in the failure of Wolcott's confirmation, Laurence Tribe attributes the rejection of Wolcott's nomination as entirely based upon his lack of qualification. TRIBE, *supra* note 3, at 81.

[26]ABRAHAM, *supra* note 4, at 30 ("In 1811 James Madison's nomination of Alexander Wolcott's vigorous enforcement of the embargo and nonintercourse acts when he was U.S. collector of customs in Connecticut. There was, however, also some genuine question as to Wolcott's legal qualifications and his moral cosmos."); OXFORD COMPANION, *supra* note 4, at 935 ("Spurred on by Wolcott's vigorous and unpopular enforcement of the Embargo, a federal statute of 1807 that prohibited all naval commerce to foreign countries, Federalists greeted his nomination with contempt, describing him as a man of mediocre talent. Despite the partisanship of these attacks, they were not far off the mark and even Republicans found it difficult to defend Wolcott. The extreme doubts within both parties about his judicial abilities caused the Senate to reject his nomination by a vote of 9 to 24.").

[27] *See* ABRAHAM, *supra* note 4, at 81 ("Although a member of a distinguished family and a proved Democrat, Woodward had acquired a reputation as an extreme American nativist and was staunchly opposed by several Democratic senators, among them Simon Cameron of his home state."); *see also* OXFORD COMPANION, *supra* note 4, at 939 ("Although a loyal Democrat from a distinguished family, Woodward failed to gain Senate confirmation. Divisions within the Democratic party – especially opposition from a senator from Woodward's home state – caused the Senate on 22 January 1846 to reject Woodward's nomination by a vote of 20 to 29.") *But see* Danelski, *supra* note 8, at 908 ("The historical context of Woodward's rejection is useful in understanding the event. The Senate was in a feisty mood. In the two years preceding Woodward's nomination it had defeated five of Tyler's Supreme Court nominations, despite the fact that all the nominees were highly regarded lawyers. Further, in the same year Woodward was rejected, two Polk nominees to executive offices were also rejected. Polk interpreted those rejections as attempts to embarrass his administration. In view of all the evidence, it is hard to conclude that Woodward's rejection is a clear precedent supporting Tribe's thesis [that a historical

Ebenezer R. Hoar	Rejected (1869-70)	Hoar was rejected because he would not support Republican Senators in their strictly partisan suggestions for lower-court nominees, opposed Andrew Johnson's impeachment, and worked for a federal civil service system.[28]

precedent exists for the regular rejection of nominees based on their personal ideology.]").

[28]ABRAHAM, *supra* note 4, at 96 ("Hoar was superbly qualified, but after seven weeks of debate and delay the Senate rejected him 24:33 on February 3, 1870. The majority was furious with Hoar for his refusal to back their strictly partisan suggestions for lower-court nominees, his active labors ob behalf of a merit civil service system for the federal government, and his opposition to Andrew Johnson's impeachment."); OXFORD COMPANION, *supra* note 4, at 404 ("President Grant nominated Hoar for a seat on the Supreme Court on 15 December 1869; a bitter fight over his confirmation raged for seven weeks. The Senate rejected his nomination on 3 February 1870 by a vote of 33 to 24. His high professional standards, refusal to play party politics, and advocacy of a civil service system lost for the nation a justice of uncompromising integrity.").

Chairman SCHUMER. I thank you, Senator Sessions.

I know that we have Senator Simon waiting. We are going to ask, if that is OK with the other members, that whatever opening statements they have be done as part of the question period. Otherwise, we will be here kind of late.

Senator Thompson is on his way over. He is debating the Export Administration Act on the floor, but let me call on Senator Simon here before us. I don't think he needs much of an introduction, but the best introduction that he can get to all of us on the panel is from his successor in the U.S. Senate and longtime friend, Senator Durbin. So I am going to call on Senator Durbin, a member of this subcommittee, to introduce Senator Simon.

Senator DURBIN. Thank you, Mr. Chairman, and I am sure other members of the Committee could take over this responsibility quite well.

I see that Senator Hatch has brought a copy of your book, Paul, to this hearing, so you know that you might be asked some questions about its content.

It is my honor today to introduce Paul Simon formally to a Committee where he served for many years. Back in 1966, in a 6-month period of time as a college student, it was my great honor to meet two men who changed my life: one, Senator Paul Douglass, whom I interned for across the street in what was then known as the Old Senate Office Building, and then just a few months later an Illinois State senator with a bow tie named Paul Simon. Those two men had a profound impact on my career decision, and ironically here a few years later I have succeeded both of them to this Senate seat.

I come here as a friend of Paul Simon's, who was also my mentor and inspiration and for many years. He served in the House and in the Senate, and while in the Senate served on the Judiciary Committee, of which we are all members. He was here during a very historic period when the nominations of Robert Bork and Clarence Thomas were considered, and I know that those experiences became an important part of his book *Advise and Consent*, which many of us have had the good opportunity to read.

I want to thank Paul Simon for joining us and I want to make certain that we plug his current position. He is on the faculty of Southern Illinois University, in Carbondale. He is the founder and director of the Public Policy Institute, where he teaches classes in legislative process for their Department of Political Science and non-fiction writing for the Department of Journalism. He is just as actively involved in the actions and passions of his time as he was as a member of the U.S. Senate and I am happy to welcome him back to the committee.

Chairman SCHUMER. Thank you, Senator Durbin. We all agree with your words of admiration—there is no better word, I think—that we all have, regardless of our party, for you, Senator Simon. It is an honor to have you here. Your entire written statement will be read into the record and you may proceed as you wish.

STATEMENT OF PAUL SIMON, FORMER U.S. SENATOR FROM THE STATE OF ILLINOIS

Mr. SIMON. I thank you very much, Mr. Chairman. I thank Senator Durbin for his generous remarks. He could have given you a

more balanced introduction and I am grateful that he didn't do that.

I didn't have the privilege of serving with you Mr. Chairman, in the Senate, but I worked with you when you were in the House, and Senator McConnell I worked with; Senator Thurmond I worked with.

I believe you had little seniority over me, Senator Thurmond, but it was a pleasure to work with you.

Senator Hatch was either the Ranking Member or the Chairman of the committee. Senator Sessions is the new Howell Heflin, from Alabama, of this committee. It is a pleasure to be with all of you.

Senator SESSIONS. Thank you, Senator.

Mr. SIMON. I will read part of my remarks. As those of you who served with me know, I didn't read remarks when I was on the floor of the Senate, but you demanded a statement and I had to sit down at my old manual typewriter and knock one out, and so I will read part of my brief statement here.

The original idea was that the Senate would be kind of an informal Cabinet for the President. But that quickly gave way and then when it came time for the first confirmations, the Senate invited George Washington to come up to the Senate to discuss the confirmations. George Washington properly, as he did in so many things, said you ought to make this decision; the President of the United States shouldn't be influencing the decision that you make. That is how things started, and started, I think, in a proper direction.

By tradition, the President does seek our advice on the district judgeships. There, the advice and consent mandate of the Constitution is clearly followed. At the appellate level, it is sometimes followed. Because I served on this committee, on at least two occasions I was consulted by the White House on appellate nominations.

But at the most important level, the Supreme Court, it is rarely followed today. We are a long way from a Supreme Court contest in which President James Garfield wrote that a nomination he made—and I am quoting President Garfield now—"will settle the question whether the President is the registering clerk of the Senate or the executive of the United States."

Two days after George W. Bush took the oath of the presidency, he met with six Democrats—Senator John Glenn; Carter Press Secretary Jodie Powell; Walter Mondale's chief of staff, Richard Mole; former Congressman Bill Gray; former Democratic National Committee Chair Robert Strauss; and myself—on how he could reach out to Democrats. I stressed that when it comes to nominations for the United States Supreme Court, he should take his time, consult with members of this Committee of both political parties, and with others, because that legacy would live long after his presidency.

On the lower courts, it is important that you get the opinion, I believe, of the American Bar Association. Even with that screening, occasionally a marginal appointee would appear before us where I said to myself, I hope nothing too complicated comes before this judge.

I stopped only two nominations that I recall, one a nominee who made racially insensitive remarks, and the other a nominee who

refused to resign from a club which discriminated, a practice I am pleased to say the Committee now follows. Beyond that, unless views expressed by a lower court nominee are extreme or there is an evident lack of ability or a question about integrity, I believe the nominee should be approved.

Let me illustrate. When Clarence Thomas came before this Committee for chairmanship of the Equal Employment Opportunity Commission, I voted against him because he did not believe in the mission of the agency. When he came before us as a nominee for the appellate court, I voted for him, but said at the time if he should be nominated to the United States Supreme Court, I would probably vote against him because of his philosophy, and that I did.

On Supreme Court nominations, whatever is considered by the President properly should be considered by the Senate. While it is true that sometimes nominees follow and unexpected pattern, in the large majority of cases the background of the nominee is an accurate gauge of the future decisions that Justice will make.

In one of the worst decisions of the Supreme Court ever made, the *Korematsu* decision, approving Franklin Roosevelt's 1942 order to suddenly relocate 115,000 Japanese-Americans, not a one of whom had committed a crime, one of the three Court dissenters was a nominee of President Herbert Hoover, and among the six in the majority were Justices Hugo Black and William Douglas, usually champions of civil liberties. One of the few people within the administration to speak out against the President's action was J. Edgar Hoover, later not so sensitive to our basic liberties. But that unexpected pattern is unusual.

The best recent example of how a nomination should be handled was President Gerald Ford's nomination of John Paul Stevens. Attorney General Ed Levi scoured the landscape for a quality Justice. Senators were consulted, as were many others. The President did not act hastily. No President should, nor should the Senate.

While it is not ideal, the Supreme Court can operate with eight members, and whatever problems that presents, it is much better than approving someone like Woodrow Wilson's appointment of Justice James McReynolds, the clear winner of the award as the worst Justice ever to serve on that high body.

During my 12 years on the Senate Judiciary Committee, no President ever talked to me about a possible Supreme Court nominee prior to the nomination. A President should do that; that is what the Constitution calls for. The President does not need to follow the advice of the Senate, nor the Senate of the President.

The Senate favored naming Aaron Burr as Ambassador to France, and sent James Monroe and James Madison to talk to the President about it. George Washington refused, saying he had, and I am quoting George Washington, "made it an invariable rule never to suggest to a high and responsible office a man whose integrity he questioned." The President was right, the Senate wrong.

Three suggestions: one, again, you should take into consideration philosophy for a Supreme Court nominee. When Earl Butz came before the Senate as the nominee for Secretary of Agriculture, Senator Hubert Humphrey said to him, "I am worried about your economic philosophy. Your bonds and stocks are to your credit. You have earned everything that you have. You can put all that in es-

crow, but I don't think you can put your philosophy into escrow." If that is a consideration for a Secretary of Agriculture, how infinitely more true is it of a lifetime member of the United States Supreme Court?

Two: practical political experience should be at least a minor consideration. Linda Greenhouse recently had an article in the New York Times in which she mentioned that only one member of the current Supreme Court, Justice Sandra Day O'Connor, has ever held elective office, having served in the State legislature. Greater elective office experience would be of help to this Court.

Three: a broad look for nominees to the Supreme Court should include non-lawyers and members of the opposite party. Justice Hugo Black favored having one or two members of the Court who were not lawyers. Someone who became a Supreme Court scholar like Irving Dilliard, of the St. Louis Post-Dispatch, would have made a superb Supreme Court Justice. Let me add that at the age of 72 I am not talking about myself. As to political party, in the last century Presidents Taft, Wilson, Harding, Hoover, FDR, Truman, Eisenhower and Nixon all nominated at least one Justice of the other party.

One final footnote. In the history of the Senate, it has rejected one-fifth of the nominees to the Supreme Court; in the 19th century, it rejected one-fourth—reasons enough for the President and the Senate to work together.

Chairman SCHUMER. Thank you very much, Senator Simon, for really excellent, thoughtful and practical testimony at the same time. We very much appreciate your taking the time to come here.

Senator Thompson has just arrived and as I mentioned before he came in, we know that he is very busy right now on the floor with pending legislation and went out of his way to be here and provide his views to us very graciously.

Senator Thompson, as everybody knows, is a friend of all of us, the senior Senator from Tennessee. He was Chairman of the Committee on Governmental Affairs, and before joining the Senate had a distinguished legal career as an attorney, serving as a Federal prosecutor and working as a staffer on several Senate committees, including a role as minority counsel on the Senate Select Committee on Presidential Campaign Activities, better known as the Watergate Committee. Elected to the Senate in 1994, he previously held a seat on this committee.

I know, because Senator Sessions mentioned this to me earlier, we both want to thank you personally for joining us today on short notice, despite the fact that you are managing an amendment on the floor. It was gracious of you. You may proceed as you wish, and we know that you will have to get back to the floor quite soon.

Thank you.

STATEMENT OF HON. FRED THOMPSON, A U.S. SENATOR FROM THE STATE OF TENNESSEE

Senator THOMPSON. Thank you very much, Mr. Chairman. I appreciate your calling me, although, as you indicated, we were both kind of running and I wish my level of preparation was the same as my level of interest.

I did want to be here with you for a few minutes today, since you did extend the kind invitation, because of my respect for you and the Ranking Member and what this Committee is trying to do, and my respect for this gentlemen right here, who personifies the integrity that we talk about when we talk about qualifications for the judiciary.

It is wonderful to see you again, Senator.

I simply had a chance to jot down a few notes and would simply like to share some thoughts as one member who is concerned about the judiciary, who has practiced law for 20-some-odd years in the vineyards, both civil and criminal, and trial and non-trial, and one thing and another.

I understand, as all the members of this Committee understand, the importance of what we are doing here because we are ultimately not trying to win elections with this process or not trying to come up with justifications for what we would like to do. We are ultimately trying to see to it that over the long stretch, a long period of time, we have the best judiciary that we can possibly have.

I am concerned that we are not moving in the right direction in that respect for a lot of reasons. Each person has their own view about advice and consent and the process, and from what I have read about it there have been times in history where almost anything has been used as a legitimate reason for supporting or opposing a President's nominations for the judiciary. I think we have been kind of all over the map historically. I don't think there is much to learn there, except that if you want to do something or come up with a reason, you can probably find some historical precedent for it.

I, first of all, turn to my own situation because every member has got to come to terms with him or herself as to what they felt that the Founding Fathers meant and would want them to do and what would be best in terms of getting a good judiciary.

To me, my hallmark has always been in looking at these nominees competence and integrity, often used, not very complicated, but to me is the absolute basis for any nominee. I approach it by giving the President some deference. I did that with President Clinton. I think my actions have backed up my words, and the record would indicate that, not total deference, not no deference, but some deference.

To me, that means if a President makes a nomination, I need a reason to oppose it, with the goal toward the judiciary. And I look at things within that broad category: if they have served in a judicial capacity, are their arguments well-reasoned, are they based on precedent, are they based on common sense, logic, fairness, intellectual honesty.

When you are talking about lower court judges, as most of the decisions—we may be here our entire careers and not have a Supreme Court Justice to consider, but we will certainly have lower court judges and district court judges. In many cases, they are the most important. I don't know of anybody in our system that is more powerful than a Federal district judge.

And if you appear before them on a regular basis, you soon conclude that it is not *Marbury* v. *Madison* that you are concerned about or that the judge is concerned about. It is work habits, it is

intellectual honesty, and it is not political philosophy. It is competence and it is integrity and it is the ability to handle a docket and be decent to people. Those things are hard to over-emphasize when we are considering the judiciary.

On the issue of judicial philosophy, I think a Senator has a right to consider whatever he or she thinks is appropriate to consider in making up their own mind. The problem, as we well know, is that you are not going to be able to predict how a person is going to decide a case. Cases are decided on the basis of individual facts presented in a given situation. They are not law school exams and they are not opinion pieces; they consider disputed facts or they wouldn't be there to start with, and factual issues.

We have seen too many cases to recount where Presidents have been surprised and Members of Congress have been surprised. Members have changed their minds about even law review articles that they themselves wrote earlier. You cannot predict. As the issues evolve, as society evolves, as a person's experience and maturity evolve, you simply are not going to be able to sit with any precision and make a decision where you rank judicial philosophy very high on your scale and feel like you are doing it based on some notion of certainty.

Again, I think we are not being totally honest with ourselves if we say we do not want to know what a person's judicial philosophy is, and if they have had a time on the bench to know what that is. I don't think that is much of an issue. I think clearly you want to know that. I think clearly we do know that, and clearly we do evaluate that. We want to make sure that that person is not an extremist in any way.

Oftentimes, we will not agree with that judicial philosophy or their personal political views. I am sure that many of those who almost overwhelmingly voted for Justice Ginsburg, having represented the ACLU, probably did not agree with her on many things. But I am sure they evaluated that, gave the President the deference that they thought he should have under those circumstances, and did not disqualify her because she had views different.

I have tried to apply that. In my home State of Tennessee, as Vice President Gore was clearly getting ready to run for President, we had about five different occasions where he essentially selected nominees down there. I supported every one of them when I was on the Judiciary Committee. I got early hearings for some of them. I came and introduced some of them. One of them was for the Sixth Circuit Court of Appeals, and other Federal district judges.

Probably, not a one of them would I have selected, strictly based on political or judicial philosophy, or what I would perceive would be their judicial philosophy, not to mention the fact that it wouldn't hurt the Vice President any to have all these judges appointed there, I suppose. But be that as it may, the main thing was integrity and competence. These people were people of integrity, these people were people of competence.

I went back this week and checked on every one of them, and the only criticism I heard of one of them was that he takes it so seriously that he gets frustrated; he is not managing the docket well

enough and it shows, and all of that. He can get over that. He is competent, he has integrity, and I think that I did the right thing.

I think we have got to be very careful not to get so results-oriented. When I read, quite frankly, where people—let me back up a second.

My concern now as we approach this new presidency is not what individual Senators use as a criterion. I think we are all going to do what we are going to do. I would be concerned if, though, the impression is going to be left that in some way we are going to come in and take factors that may have been considered all along and rearrange them and reprioritize them in a way to get the end result that we want to get. I do not think that that is the right. With all the disputes we have had back and forth, I do not think that has been done in the past.

I think the atmospherics of all that are important and I think if we stray too far from the basics of competence, integrity and some deference to any President, because he puts the person in play—I mean, after all, it is not like we get to come up with somebody. He puts the person in play and we are put upon to deal with it. If we do that, we are going to get bogged down into a political quagmire that is going to result in endless rounds of payback.

When I read where people talk about we need new balance, circumstances are different now; we have got a certain kind of revolution going on, meaning an area of the law that I specialize in and that is the most important one, and so it is important we have certain kinds of judges for that; we need to go back and rectify the injustice of *Bush* v. *Gore*—when I read certain members are saying they are going to put a hold on anybody in their entire circuit, whether it is in their State or not, it is not going to help the judiciary any. It is hard enough to get good judges as it is.

Mr. Chairman, back when Eisenhower was President and he had the opportunity to appoint John Marshall Harlan to a Southern district judgeship and he left Sullivan and Cromwell to take that position, there are not many John Marshall Harlans. That is for sure, but how many people of that caliber are eager now to take on a Federal district judgeship? We have made that job in many cases a very unattractive job. To start with, he would have to make less than a beginning associate at Sullivan and Cromwell.

But with all of the legislation we have passed and all the additional burdens we have put on the judiciary, do we really want to put these good people we are trying to entice to make sacrifices through a living hell in order to get there? I don't think it would do the judiciary any good and I don't think it would do the Senate any good, because there will always be payback.

You are going to have the presidency back one of these days and we are going to have the Senate back one of these days. We know how that goes. It depends on when you came to this game as to what your views are because one has no historical perspective. But everybody has got something to complain about as far as the treatment of the prior batch, and that will always be there to some extent. That is not the end of the world, the fact that at the end of the term you do things a little differently. That is resolved in the political process. If you get too far out of line, it seems to me like you ought to pay at the polls. It is not that.

It is that if we get into the notion that we are going to radically change the way we are doing things now and the perception is out there that, as I say, we are going to kind of reprioritize things and reemphasize things in order to get the result we want, I am afraid it is going to further balkanize us. One side remembers what was done to them in the 14th century and the other side remembers what was done to them in the 17th century, and they will never probably get over it.

So I am not saying that I am naive enough to think that partisan considerations can, or even should be totally eliminated from any process. I just hope that we resist the temptation in this important matter to further divide ourselves and lay further groundwork that if it gets too far out of hand will be paid back. I know that we all share the same general goal in that regard.

Again, I appreciate the opportunity to be heard.

Chairman SCHUMER. Well, thank you, Senator Thompson. Once again, your remarks were really excellent. I know that you have to get back to the floor. Can you stay for a few questions?

Senator THOMPSON. Well, if you have any, I will refer them to Senator Simon.

Chairman SCHUMER. I have a few for both, but we will try to make this part of it as quick as we can and get to our next panel.

My question, I guess, to you, Senator—and I will just ask one to you and then go to Senator Simon—you may have heard Senator Simon's testimony sort of was consonant with yours in one sense. To avoid this kind of nasty process which we all think is awful—I called it before you came in "gotcha" politics where everything is sort of under the table and then you look for something they did wrong way back when, and that is the demeaning part of the process, when we really want to talk about other things. You end up with a real problem.

One of the things Senator Simon suggested is that at least the "advice" part of the Constitution, where the President was intended to consult with the Senate not just on district nominees which happen, but on appellate nominees, and he suggested, and others have too, Supreme Court nominees, be revitalized, brushed up a little bit so that it is not just a call an hour before saying we are nominating so-and-so, but rather there be some consultation.

What do you think of that idea?

Senator THOMPSON. I think that is a practical consideration that the President ought to decide for himself. I assume most Presidents don't do that because of their view of constitutional history and checks and balances. They do it because they want to get their guy through. I think that it can have a salutary effect, but I would think we would be intruding on the office of the presidency if we in any way required or expected him to pre-approve his nominations before he made them. I think that how he comes to his conclusions hopefully will be a found process and may or may not include what you suggest, but it has got to be his process. Then, of course, he bears the consequences of how it is received on the Hill.

Chairman SCHUMER. The suggestion, I think, is it might avoid some of the acrimony that we have seen in judicial appointments if there were a little more of that. I don't know if it would happen, and obviously each President makes his own decision about what

"advice" means—they didn't just say "consent," they said "advice and consent"—but as a way of bringing things more together, particularly, I would suppose, when the Senate is of one party and the President is of another, whichever way it is.

Senator THOMPSON. Well, I take your point. I would imagine that the need to consult early on would probably be in inverse proportion to the quality of the candidate.

Chairman SCHUMER. That is probably true.

Senator THOMPSON. If the President chooses the kind of person that he ought to choose, that person ought to stand on their own merits and ground. I would think that a President would want as many in his pool to consider as he could possibly have and maybe people he and his close friends do not know. I think from that standpoint that any President would want a broad array of qualified people.

There are so many wonderful judges and non-judges out there in the country who have never been involved in politics and never aspired to a high position like that who would be wonderful choices. So to the extent that he could get some of those from us, I think it would be a good idea. But, again, that has got to be his choice to make.

Chairman SCHUMER. Let me ask Senator Simon just two questions and then I will move on.

First, I thought your suggestion that there be some non-lawyers on the Court is a very interesting one. Your knowledge of history is probably better than mine. Who was the last non-lawyer to serve on the Supreme Court? Was it Hugo Black?

Mr. SIMON. I am not aware of any non-lawyer who served.

Senator SESSIONS. Hugo Black was from the University of Alabama School of Law.

Chairman SCHUMER. Hugo Black was, so it wasn't Hugo Black.

Mr. SIMON. Who?

Senator SESSIONS. Hugo Black.

Mr. SIMON. I wasn't aware of that, frankly.

Senator THOMPSON. I am informed that there has never been a non-lawyer on the Court.

Chairman SCHUMER. On the Supreme Court, OK; there you go.

The second question I had was this, Senator Simon: You had mentioned that you thought for the Supreme Court—both of you are not terribly far apart in saying that judicial philosophy should be part of what every Senator considers, but not totally dispositive. I think Senator Thompson said we ought to give some consideration, not complete, to what the President does, and I suppose, given the history of what you said you did in the Senate, that is what you did.

If somebody was way over the line, you probably didn't support him, but even if somebody like Justice Ginsburg, whom you didn't agree with on everything—I don't have right in front of me how you voted on it—you would defer to the President's concerns. Senator Simon mentioned the same thing. He said it ought to be more of a consideration for Supreme Court Justices than for appellate court judges.

Last time, at our panel, we heard some discussion that because so few cases now reach the Supreme Court and so much final law

is made at the court of appeals level—and that is just because of the huge volume of the bench and the larger number of cases that our Federal courts have taken over the years—that even for particularly court of appeals, maybe not district court judges, judicial philosophy ought to have some consideration.

What do you think of that?

Mr. SIMON. I don't reject the idea that it should have some consideration if there is extreme philosophy, but the Supreme Court really sets the standard for the appellate courts and the district courts. Just as an example, you have the University of Georgia decision on diversity, you have the University of Michigan decision, you have the Hopwood decision in Texas. Those three cases ultimately are going to be decided by the United States Supreme Court and the appellate courts are going to have to follow that.

One of the things Senator Thompson mentioned that I agree with completely is when we talk about consultation or advice, it should not be that we pre-approve someone, but the President ought to be asking, Senator Kyl, do you have someone you think would be a great United States Supreme Court Justice? Ask the members of this body, and then if the President—and I mentioned Woodrow Wilson's terrible appointment of James McReynolds, but it was the same Woodrow Wilson who decided, after consultation, to appoint Justice Brandeis, one of the great giants in the history of the United States Supreme Court. Because of Brandeis's fights with the utilities, he knew that was going to be a controversial appointment. The President has that right, to nominate but there ought to be consultation. It is not an option. The Constitution says "advice and consent."

Chairman SCHUMER. Thank you. In deference to your schedule, Senator Thompson, I will skip the rest of my questions and turn to Senator Sessions.

Senator SESSIONS. I will just ask one question and then yield my time to Senator Hatch.

Fred, you have tried cases before a lot of Federal judges, and you have mentioned integrity and competence, and I think you include in competence, judgment, the ability to analyze complex case law to render a decision in court or after contemplation effectively.

Based on that experience, does it matter to you whether the judge is a Republican or Democrat? Isn't it true that most of the time, regardless of party, a good judge will hit the same nail every time?

Senator THOMPSON. You mean after the appointment process?

[Laughter.]

Senator SESSIONS. After the appointment process.

Senator THOMPSON. Honestly, no. I can't think of a time when I ever had a case where it was relevant or it was in any way remotely decided, I thought, on that basis.

Senator SESSIONS. Whether they were liberal or conservative before they hit the bench?

Senator THOMPSON. Exactly.

Senator SESSIONS. That is my experience.

Senator THOMPSON. Exactly. If they were good, conscientious, hard-working, intellectually honest lawyers, regardless who they represented or what not, they were that kind of people on the

bench. Every once in a while, their judicial temperament would be lacking a bit, but that seems to be a bipartisan trait.

Senator SESSIONS. They thought they were anointed rather than appointed?

Senator THOMPSON. Exactly.

Senator SESSIONS. Senator Hatch?

Senator HATCH. Well, thank you for yielding to me.

Chairman SCHUMER. Senator Hatch is the Ranking Member of the committee. We welcome you here today, and thank you very much for your interest in this subject.

Senator HATCH. Thank you, Mr. Chairman.

Paul, we are glad to have you back.

Mr. SIMON. Thank you.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. I remember all those years we served together on this committee, and we appreciate your friendship and the life that you have lived and I appreciate your testimony here today.

In my 25 years in the Senate I have seen a lot, and thus I have much to say on this important topic. I agree with Senator Thompson, basically, what his remarks are. He has tried a lot of cases in Federal court, and so have I. Unfortunately, I have had the experience of having Federal court judges who used partisan tactics in court, both in Pittsburgh and in Utah. But they were aberrations, they were unique judges. Even though each of them did some things that I thought were not proper, the fact of the matter of the matter is they were great characters in the law and I always showed great respect to both of them.

What worries me is that some could argue that this hearing appears to be part of a partisan strategy to change the longstanding practice of this Committee and the Senate by injecting partisanship into the judiciary, the branch designed by the Founders to be insulated from the very kinds of temporarily fashionable political ideas that some are now trying to infuse into it.

I think we have some charts here. This Chart 1 is an excerpt from a cartoon that recently appeared in Roll Call and captures what appears to be the theme in what we have been hearing in these recent hearings and what some are speculating is the Democrats' plan. The Democrats' Capitol Improvement Plan seems to be an effort to halt progress on judicial nominations in the name of analyzing the ground rules for the judicial confirmation process. That is what some think.

The New York Times reported on just such an effort being launched at a retreat for Democratic Senators earlier this year. Several liberal scholars reportedly instructed the audience to "change the ground rules" of judicial nominations in order to prevent the confirmation of judges who do not meet certain litmus tests of currently vogue liberal politics.

This was the type of strategy the liberals employed after the Democrats took control of the Senate in 1986, and the result was the fiasco over Hon. Clarence Thomas, which has been a stain on the reputation of this body ever since. As one recent article reports, just a few years before the Thomas confirmation hearing, however,

the judiciary selection rules had radically changed. Democrats captured the Senate in 1986, in that election, and conspired with leftist legal gurus that dramatically politicized the process. They used this slash-and-burn manual when they could not defeat Thomas on the merits.

The place to begin the discussion of burdens in the judicial nomination process, of course, is the Constitution. The Constitution gives the President the power to appoint judges. The most significant burden borne by a candidate for a judgeship is to convince the President that he or she is the best person for the job. Together with the clear constitutional dictate, the modern method of screening judicial candidates is one of the primary reasons that the Senate gives Presidents' nominations great weight.

I have long maintained the view that a President's judicial nominations are deserving of deference. Indeed, when I was charged as Chairman of this Committee with leading the evaluation of judicial nominees, I held steadfast to this view during our consideration of one of President Clinton's most liberal and controversial nominees—and I might say on a great number of them—the Honorable Marsha Berzon, I will point out just for the sake of the record, who was the former head of the litigation section of the ACLU's San Francisco Chapter.

Here is what I said in July 1999 about the way we should treat Judge Berzon's nomination: "I have reservations regarding the application of a different standard to any nominee for the Ninth Circuit or the other circuit courts. In my view, the Senate standard for confirming nominees to the Federal bench derives directly from the Senate's advice and consent power in Article II, section 2, of the Constitution. This standard does not change from nominee to nominee. On the one hand, we must carefully examine a nominee and conclude that he or she is qualified to hold a life-tenured position in the Federal judiciary. On the other hand, we must generally defer to the President whom the people elected to fulfill the constitutional duties of his office, including the selection of the nominees to our Federal courts. Thus, I believe that this Committee should focus on the qualifications of a nominee—honesty, temperament, and the nominee's appreciation for the proper constitutional role of the Article III judge. I believe that both Republican and Democrat nominees who meet these high standards should be confirmed."

Now, these principles of our constitutional duty remain as true today for President Bush's nominees as they were for President Clinton's nominees. Any suggestion that a heightened level of scrutiny is appropriate for this President's judicial nominees because of the peculiarities of the 2000 Presidential election, I think, is simply irresponsible.

There is no question, for example, that Senator Daschle is the Majority Leader or that Senator Leahy is the Chairman of this important committee. They are due all the respect and deference that come with those positions, despite the fact that they did not gain those positions in a landslide election, or any election at all for that matter. So regardless of how much you may disagree with President Bush, the fact remains that his nominees should be judged by the same standard as the judicial nominees of other Presidents.

I would like to put the rest of my remarks in the record at this point, Mr. Chairman, and just make one last comment, and that is that I believe that if we get to the point where we start making the ultimate determination, one of politics or one of viewpoint or one of ideology, then I guarantee you there is going to be war on Capitol Hill from both sides. That is something we want to avoid.

That is why we have Presidents and that is why they have this great nomination power which, in my perception, is greater than the confirmation power, although both are important and exceptional powers. I believe when we start coming to the conclusion that ideology should play the major role in determining whether a person sits on the Supreme Court or any other court in this country, then I think we will be on the way downward to getting a very, very inferior judiciary.

My experience has been that you can't tell what a person is going to be when they are up for their nomination. Many of them have proven to be somewhat completely different from what the President who chose them thought they would be. We all know the old story about President Eisenhower, who said that I have only made two mistakes in my whole presidency and they are both sitting on the Supreme Court.

Well, whether that was a correct observation or not is kind of irrelevant. The important thing is that we do our job to look at these nominees and to determine who should sit on these courts, and we do so in a fair and responsible way, giving great deference to the President of the United States, whoever he or she may be.

Thank you, Mr. Chairman.

[The prepared statement of Senator Hatch follows:]

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

I would like to thank Chairman Schumer for permitting me to say a few words on the important question of who bears the burden in the judicial nominations process.

During this subcommittee's last hearing on judicial nominations—the one about the role of ideology—I expressed my hope that the heightened focus on judicial nominations, engendered by the change in control of the Senate, would prove to be unwarranted. I said that I was optimistic that the new Democratic leadership would treat President Bush and his judicial nominees fairly, and I still remain optimistic about that.

The coming weeks will show whether my confidence is warranted or misplaced. There are 40 judicial nominations pending before the Committee. The history of the Judiciary Committee is that, during the first year of a new presidential administration, we act by the end of the year on all judicial nominations made before the August recess. This means that the Committee has its work cut out for it: hearings and mark-up votes on 40 judicial nominations before the session's end. Achieving this goal would not only preserve the Committee's historical record of fairness and diligence, but would also prove conclusively that the Democrats mean what they say about fairness.

Some of President Bush's judicial nominations already have been waiting for an unnecessarily long time. Of his first 11 nominations, made approximately 118 days ago on May 9th, only one has had a hearing. Nine of the other ten are completely ready to go: their paperwork is complete, their FBI background checks are done, the blue slips are in, and outside groups—including the ABA—have had ample time to comment. We could be having a hearing right now on two or three of them.

Now, I am not suggesting that today's hearing on burdens is a misallocation of the Committee's time and energy when we have so many nominees and vacancies pending. There's nothing wrong with examining our own process from time to time, if.done fairly and for the right reasons. What worries me, however, is that we appear, and this hearing appears, to be part of a partisan strategy to change the longstanding practice of this Committee by injecting partisanship into the judiciary—

the branch designed by the Founders to be insulated from the very kinds of temporarily fashionable political ideas that some are now trying to infuse into it. This excerpt from a cartoon that recently appeared in Roll Call captures what appears to be the theme in what we have been hearing at these recent hearings, and what some are speculating is the Democrats' plan. The Democrats' Capitol Improvement Plan seems to be an effort to halt progress on judicial nominations in the name of "analyzing the ground rules" for the confirmation process.

The New York Times reported on just such an effort being launched at a retreat for Democratic senators earlier this year. Several professors, well-known not only for their scholarship but also for their radically left-of-center political bias, reportedly instructed the audience to "change the ground rules" of judicial nominations in order to prevent the confirmation of judges who do not meet certain litmus tests of currently vogue liberal politics. This was the type of strategy the liberals employed after the Democrats took control of the Senate in 1986, and the result was the fiasco over the Honorable Clarence Thomas, which has been a stain on the reputation of this body ever since. As one recent article reports:

> "Just a few years before [the Thomas confirmation hearing], however, the judicial selection rules had radically changed. Democrats captured the Senate in the 1986 election and conspired with leftist legal gurus such as Harvard law professor Laurence Tribe to dramatically politicize the process. They used this slash-and burn manual when they could not defeat Thomas on the merits."

For the sake of this body and our republic, I hope that my colleagues in the Senate heed the advice of former Carter and Clinton counsel Lloyd Cutler—and not the brilliant, yet ultraliberal activist, Professor Tribe—and refrain from staging an encore performance of that disastrously mis-scripted play.

On the narrower point of this hearing, I think the place to begin the discussion of burdens in the judicial nominations process is the Constitution. The Constitution gives the President the power to appoint judges. The most significant burden born by a candidate for a judgeship is to convince the President that he or she is the best person for the job. In other words, the burdens of the judicial nominations process do not begin when the Senate Judiciary Committee receives the official nomination from the White House. Far from it. That one page presidential document represents a nominee who has already passed a rather extraordinary test. As administered in modern times, the presidential judicial selection process consists of exhaustive examinations not only of the ultimately successful nominees, but also, typically, of at least a handful of other serious contenders for the job. In conducting this research, lawyers in the White House and the Department of Justice work closely with home-state Senators and typically seek input from avariety of local lawyers, bar associations, and interested citizens concerning potential candidates. In some states, senators have established advisory committees who evaluate potential candidates. The upshot of all this is: by the time a nomination emerges from the White House, the nominee typically has already met the extraordinary burden of convincing his or her local colleagues, his or her senators, the Department of Justice, and the President of the United States that he or she is the person most suitable for the job. To make believe otherwise is simply a fantasy. Together with the clear constitutional dictate, the modern method of screening judicial candidates is one of the primary reasons that the Senate gives presidents' nominations great weight.

This is a view that I have long maintained. Indeed, when I was charged as Chairman of this Committee with leading the evaluation of judicial nominees, I held steadfast to this view during our consideration of one of President Clinton's most liberal and controversial nominees, the Honorable Marsha Berzon, who was the former head of the litigation section for the ACLU's San Francisco chapter. Here's what I said in July 1999 about the way this Committee—and the Senate—should treat Judge Berzon's nomination:

> "I have reservations regarding the application of a different standard to any nominee for the Ninth Circuit or the other circuit courts. In my view, the Senate's standard for confirming nominees to the federal bench derives directly from the Senate's advice and consent power in Article II, section 2 of the Constitution. This standard does not change from nominee to nominee. On the one hand, we must carefully examine a nominee and conclude that he, or she, is qualified to hold a life-tenured position in the federal judiciary. On the other hand, we must generally defer to the President whom the people elected to fulfill the constitutional duties of his office, including the selection of nominees to our federal courts. Thus, I believe that this Committee should focus on the qualifications of a nominee: honesty, temperament, and the nominee's appreciation for the proper constitutional role

of an Article II judge. I believe that both Republican and Democratic nominees who meet these high standards should be confirmed."

These principles of our constitutional duty remain as true today for President Bush's nominees as they were for President Clinton's nominees. I encourage partisans on both sides of the aisle to think carefully about this before coming to a contrary view. None of us Senators gets our first pick as president every time, but all of us have chosen to take an oath to preserving our Constitution and the balance of powers it established. And any suggestion that a heightened level of scrutiny is appropriate for this President's judicial nominees because of the peculiarities of the 2000 presidential election is simply irresponsible. There is no question, for example, that Senator Daschle is the Majority Leader or that Senator Leahy is Chairman of this Committee. They are due all the respect and deference that come with those positions, despite the fact that they did not gain those positions in a landslide election, or any election at all, for that matter. So, regardless of how much you may disagree with President Bush, the fact remains that his nominees should be judged by the same standard as the judicial nominees of other presidents.

On the specific question of the nominee's burden during the confirmation process, my remarks regarding Judge Berzon's nomination are once again reflective of the view I continue to hold today. I said, .

". . .[W]e must be careful not to assign a particular judicial philosophy to a nominee who has taken controversial positions in the very difficult role of advocate. Being an advocate in controversial and challenging case[s] does not, in my view, automatically disqualify a person from service on the federal bench. I must agree that an extensive amount of such work may increase the level of scrutiny the Committee should apply to a nominee. And perhaps such work may even shift the burden to the nominee to demonstrate that he, or she, understands and respects the proper role of a federal judge. However, such work is not, and should not be, an insurmountable impediment to Senate confirmation."

These remarks reveal my comprehension of the intent of the Framers of our Constitution and of longstanding Senate practice, that the burden in the confirmation process shifts to the nominee under only extraordinary circumstances. My distinguished former colleague, Senator Paul Simon, who will testify before us today, appears to agree with me. In his written testimony, he stated, "[U]mess views expressed by a lower court nominee-are extreme or there is evident lack of ability or question about integrity, I believe the nominee should be approved." While I cannot wholeheartedly endorse this statement, since Senator Simon did not define what he meant by extreme views, I do believe that the good Senator and I share a similar understanding regarding the deference due to a President's judicial selections.

Let me explain my concern about wholesale acceptance of the idea that a nominee should be disqualified because of what some perceive as extreme views. The source of my concern is that characterization of a nominee as having extreme views may be a way of imposing an ideological litmus test on the nominee: any nominee who disagrees with my Democratic colleagues on various social issues will be labeled as an extremist who is out of the mainstream and who should therefore not be confirmed. But the Senate's responsibility does not include establishing an ideological litmus test to gauge a candidate's fitness based on his or her position on controversial issues. The hallmark of a good jurist is one who does not allow personal opinion to affect objective legal decision making. Thus, personal views should be considered for the limited purpose of ensuring that they will not interfere with the nominee's ability as a judge to follow the law impartially and fairly.

Perhaps it is in recognition of just this—the principle of stare decisis—that Senator Simon believes that judicial philosophy is an appropriate matter of inquiry for only Supreme Court nominees, and not lower court nominees. For the reasons I have articulated, I disagree with the use of ideology as a basis for denying confirmation to a Supreme Court nominee. But I do agree with the premise that lower court nominees should be approved absent extraordinary circumstances, such as proof of racial insensitivity. These are matters that strike at the heart of a nominee's integrity and an understanding of the rights granted to us by our Constitution, and reflect poorly on the ability to apply the law fairly and impartially to the litigating parties. They thus serve as fair grounds for disqualification. Absent such indicia of a nominee's unfitness, once we have reviewed the nominee's qualifications and found?that he or she has the intellectual capacity, integrity, and temperament to fill the role of a federal judge, the nominee should be confirmed.

This is the same view expressed by former Carter and Clinton White House counsel Lloyd Cutler during this Subcommittee's last hearing on the role of ideology in the judicial confirmation process. Quoting from a report issued by a commission in which he participated, Mr. Cutler stated,

"What is most important is the appointment of judges who are learned in the law, who are conscientious in their work ethic, and who possess what lawyers describe as 'judicial temperament.' . . . The Commission believes that it would be a tragic development if ideology became an increasingly important consideration in the future. To make ideology an issue in the confirmation process is to suggest that the legal process is and should be a political one. That is not only wrong as a matter of political science; it also serves to weaken public confidence in the courts. Just as candidates should put aside their partisan political views when appointed to the bench, so too should they put aside ideology."

I believe the President's power to nominate judges is an essential part of the balance of powers. This is the reason that, despite many ideological and political differences, the Judiciary Committee under Republican leadership confirmed 377 of President Clinton's judicial nominations. This number is essentially the same—only 5 fewer—than the record number confirmed under President Reagan. If Republicans had infused ideological litmus tests into the process—as some Democrats are toying with doing now—those numbers would be dramatically different.

So, Mr. Chairman, there is plenty to talk about here today, and plenty of work yet to do on filling the 108 judicial vacancies. Thank you again for allowing me the opportunity to speak.

Chairman SCHUMER. Thank you, Senator Hatch.

Now, let me call on Senator Durbin.

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLNOIS

Senator DURBIN. Thank you very much, Mr. Chairman, and thank you for this hearing. I know this is the second of three, and I think it is important.

I would take exception perhaps to some of the things that have been said. I think it is important for us to put this issue right out on the table and talk about it because I think what you have done in calling this hearing is really you have asked to be a lot more honest and truthful in how this process really works.

There have been nominees in the past who did not pass some ideological test and it wasn't heralded or reported. Those nominees were usually relegated to a Judiciary Committee purgatory where there was no hearing, no vote, no hope. They were gone, and they would sit here usually for months and years and finally give up the ghost, or someone else would decide to move on.

I think it is important to bring this out in front of everyone and discuss it, and I think that I would concede the point that has been made by Senator Hatch and others that sometimes you are surprised. Hugo Black was not supposed to turn out to be a liberal. He surprised everybody. I think you can find other stories on the other side politically of those who turned out to be more conservative than anticipated. So this isn't a precise science.

I have one specific question I would like to ask of the two witnesses because they have been through a process that I haven't been through, and that is the selection of a Supreme Court Justice. If ideology is going to be an important consideration, clearly you have to ask the right questions to get answers to understand a person's philosophy.

Now, in the Clarence Thomas hearing you had a person who had studied for the Catholic priesthood, but came before this Committee and said he had never discussed *Roe* v. *Wade* or the abortion issue to that point in his life. That strikes me as a question which, if asked and answered the same way, might give a lot of people pause as to whether or not you can just say I have never

really thought about an issue like the death penalty. Do you think that is an important consideration, or the abortion decisions?

How do you balance the need for someone who is seeking the bench not to tip their hand and commit themselves on cases in the future and yet be honest enough so that you understand what their philosophy is on an important issue like a woman's right to choose or privacy or the death penalty as you go into the process?

Senator Simon?

Mr. SIMON. I think a nominee can say, "I will give you my personal attitude, but this doesn't mean that is how I am going to rule when I am on the United States Supreme Court." So there is a certain amount of evasiveness that can occur without having said "I don't remember ever having discussed *Roe* v. *Wade*." You know, that became kind of implausible to some of us. So I think you can do that.

Now, it doesn't mean that you are not going to—well, an example, Justice Scalia, whom I like personally, a very likable person. Only one member of this Committee voted against him, Senator DeConcini, who said he didn't answer our questions. All the rest of us voted for him. I voted for him on the floor. Frankly, if I were to redo my vote, I would vote against Justice Scalia, not that I don't like him, but I don't think he represents what I believe should be the philosophy of the United States Supreme Court.

I think nominees can be candid. I think we have to be careful how we ask questions. We can't ask, how would you rule on reversing *Roe* v. *Wade*. I think, there, a nominee is going to properly say "I can't answer that question." But the general parameters of where the nominee stands—I think we ought to know that.

Senator DURBIN. Senator Thompson, how would you reconcile that?

Senator THOMPSON. Well, that is not easy. I haven't, as a matter of fact, been here for a Supreme Court vote yet, but I can see how it is going to be difficult. I think that one needs to look at what the purpose of the inquiry is, what it is about.

Clearly, on issues of competence, integrity, understanding the law, if the person has been on the bench before, the decisions they have made, whether or not they stand up to analysis and scrutiny—I think those are all valid considerations.

If, in fact, the purpose is to either get the person in a position where they refuse to answer because they feel like the question is inappropriate and thereby raise the DeConcini problem, or if the purpose is to pin a person down and to try to kind of get a commitment—surely, nobody thinks that a Justice ought to talk about how they will on a particular case, but if it is to try to pin them down as to how they will rule in a particular kind of case, I think that is very inappropriate, also.

It is somewhat of a fool's errand, too, because cases are based on the facts of an individual case, the case in controversy. You will never be able to present a case that hasn't happened yet as a hypothetical. You will never be able to foresee the kinds of things that will come up before the judge. There is an area of propriety there that I think we are free to explore in terms of their judicial integrity.

But to take one area of the law and say this is the most important one and you have got to pass a litmus test on this, or another area of the law and say that you have got to make a certain kind of commitment on that, when in all instances what they need to do first and foremost, and I think it so outweighs everything else, is approach it with a sense of integrity, intellectual honesty, an astute understanding of the law, and I think for the Supreme Court hopefully be a person of wisdom—all the rest of this stuff is for us; it is not them. It is not about them. It is about us and what we can do to them or for them. It doesn't make for better judges, it doesn't make for more enlightenment as to what kind of judge they will be. So I think we ought to be careful when we get past that.

Mr. SIMON. Could I give a 60-second response?

Senator DURBIN. Please.

Mr. SIMON. When Judge Bork was before us, I was inclined to be against him, but wasn't sure, and I asked him about the Ninth Amendment of the Constitution. Madison originally had 12 amendments to the Bill of Rights and Alexander Hamilton wrote to him and said, if you spell out these rights, people will say these are the only rights that people have. So the Ninth Amendment was added, saying other rights not spelled out here are reserved to the people.

When I asked Judge Bork about that, he said, well, I think they probably meant other rights are reserved to the States. Well, you know, that is a dramatically different kind of a thing, and that indicated to me a philosophy. I think those kinds of questions are proper.

Chairman SCHUMER. Did anyone object to that question to you afterwards or in any way?

Mr. SIMON. I don't recall that anyone paid any attention, Mr. Chairman.

[Laughter.]

Mr. SIMON. As they usually didn't to my questions.

Chairman SCHUMER. Well, that is what we are trying to do here, is figure out the parameters of what is appropriate and what isn't appropriate, and have it be above board. I am sorry if anybody takes umbrage at that. I think it is a fair and legitimate inquiry.

Senator Thurmond, a member of the subcommittee.

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. Mr. Chairman, the confirmation of Federal judges is one of the greatest responsibilities of this committee. We should consider whether the individual is qualified and whether he or she understands a judge's limited role in our constitutional system.

However, in my view, the President is entitled to some deference in the choices he makes for the Federal courts. I do not believe a nominee must somehow prove to the Committee that they deserve to be confirmed. Creating this special burden on the nominees is not the tradition of this committee. In fact, during most of the Senate's history judicial candidates did not even appear before the committee. The burden should not shift based on which party is in power in the White House or in the Senate at any particular time.

Our constitutional responsibilities should remain consistent, regardless of politics.

Thank you.

Chairman SCHUMER. Thank you, Senator Thurmond.

We have two members of the full Committee who are not members of the Subcommittee and I would be happy to give them a brief moment to just—

Senator SESSIONS. Senator Thurmond hasn't used all his time.

Chairman SCHUMER. Did you have any questions, Senator Thurmond?

Senator SESSIONS. Would he yield that to the others? I have had my questions.

Chairman SCHUMER. I don't mind Senator McConnell and Senator Kyl, as long as they are brief, asking questions to the witnesses.

STATEMENT OF HON. MITCH MCCONNELL, A U.S. SENATOR FROM THE STATE OF KENTUCKY

Senator MCCONNELL. Well, Mr. Chairman, I don't know what "brief" means. I am certainly not planning on filibustering and I appreciate the opportunity to make some observations.

First, I want to welcome our old friend, Paul Simon, back. We were sworn into the Senate on the same day and it is good to see you again, Paul.

Mr. SIMON. Thank you.

Senator MCCONNELL. As one of the most conservative members of the Senate, and some would argue one of the least bipartisan, I voted for Justice Breyer, Justice Ginsburg, and almost all of the 377 judges that President Clinton nominated.

Like Senator Thompson related his experience in Tennessee, I returned every single blue slip on a Kentucky nomination, did not expect Senator Clinton or Senator Ford to call me and ask my advice on who they should select because, after all, they had won the election. Certainly, I didn't try to dictate the selection of judges in the Sixth Circuit from Kentucky. So I must say, Mr. Chairman, I am somewhat disturbed by these hearings and where they appear to be leading.

We have had until recently what could best be called the Biden standard which several Senators have outlined, which was the same as the Hatch standard, which was basically the standard that Senator Thompson outlined which is one of competency and approach to handling issues. That has prevailed, I think, for most of the time since we have been here and really, for that matter, most of the time since the Senate has been confirming nominations to the Supreme Court.

Curiously, when we were confirming all of the judges that President Clinton nominated, there were no Democratic calls for placing the burden on Democratic nominees to prove their fitness for the bench. But after President George W. Bush was sworn into office and began nominating people to the Federal bench, we suddenly heard calls for changing the standard by which we consider judicial nominees.

Specifically, after President Bush informed the ABA that it would evaluate judicial candidates after their nomination, there

was a letter sent by some of our colleagues to the President which protested. They wrote, "We firmly believe that ending the long-established practice of ABA review would dilute the quality of the Federal bench. ABA evaluation has been the 'gold standard' by which judicial candidates are judged."

So applying the gold standard, the ABA ratings on President Bush's early nominations have come out: Miguel Estrada, well-qualified; Jeffrey Sutton, majority qualified, minority well-qualified; James Gritzner, well-qualified; Carolyn Kuhl, well-qualified; Charles Pickering, well-qualified; Barrington Parker, well-qualified; and Dennis Shedd, well-qualified. Indeed, to date, all of President Bush's nominees have met the gold standard, the ABA standard. Yet, none have been acted upon.

Once it became apparent that President Bush's judicial nominees were going to pass the ABA gold standard with flying colors, some on the left again changed the test that nominees would have to satisfy. This time, many of our colleagues across the aisle pronounced that the President's judicial nominees would have to satisfy some sort of ideological litmus test, with only those nominees who were in the "mainstream" being able to serve on the Federal bench.

So we have a new standard, the "mainstream." Some consider that the editorial opinion of the New York Times as mainstream. For some of us, mainstream values are more likely to be found in Ohio or Tennessee or Kentucky or Arizona than on the editorial page of the New York Times.

To no great surprise of members on this side of the aisle, Laurence Tribe recently testified that Republican nominees should be subjected to higher scrutiny and should bear the burden of proving their worthiness to be confirmed. So much for any shred of deference to the President's sole constitutional power to nominate. We would now have 50 or 51 co-presidents who would change their constitutional role from "advice and consent" to "demand and dictate," where they essentially get to renominate each and every nominee to the Federal bench.

After the Biden standard for the Democrats, the very similar Hatch standard, and the recently minted gold standard, we have yet another standard. This could best be described as the "double standard" for Republican nominees. Now, I say this double standard was no great surprise to us on this side of the aisle because we had seen some on the left advocate it before when discussing Republican nominees.

In 1990, when arch-conservative David Souter testified before this committee, some of our Democratic colleagues stated that he would have to bear the burden of proving his worthiness. In 1987, when Professor Tribe testified against Robert Bork, he also argued that the burden should be on the nominee. So I guess it is only natural to have a double standard now that we have Republican nominees again.

Well, if we Republicans adopted that standard for President Clinton's nominees, I guarantee you we would have confirmed far fewer than the 377 that we confirmed, and I certainly would have liked to have had a lot of my votes back. In the end, we should use the same standard for Democratic and Republican nominees. If they are men and women of integrity, are qualified, have a judicial tem-

perament and will follow the Constitution and statutes as they are written and intended, we ought to confirm them.

Finally, there are calls for ideological diversity. The use of litmus tests which this approach necessarily entails are really thinly veiled demands for blocking judicial nominees in the name of political diversity, not racial diversity, mind you, but political diversity.

The Constitution already provides for such diversity by empowering the President, not us, to nominate judges to the Federal bench. Over time, Presidents from different political parties will nominate members of their own party to the bench. This will result in political, and hence ideological diversity on the Federal bench.

The current composition of the Federal bench provides an example of this. With respect to active-status Federal district and appellate court judges, there are currently 400 Democratic-appointed judges and about 330 Republican-appointed judges. This translates into 55 percent of the judges being Democratic, while only 45 percent are Republican. Let me just suggest that after Roosevelt and Truman, I expect there were darn few Republican judges on the Federal courts of this country, and a good deal of political diversity would have been required at that point to even it out.

Mr. Chairman, I think you get my drift. These are hearings that are heading us in entirely the wrong direction. As Senator Thompson pointed out a while ago, 1 day you will have the White House again and we will have the Senate again, and we are drifting off in a direction that will make it impossible to confirm judges to the Federal courts. I think that is not what the Constitution expected. I certainly don't think it is what the American people want us to do.

Thank you very much.

[The prepared statement of Senator McConnell follows:]

STATEMENT OF HON. MITCH MCCONNELL, A U.S. SENATOR FROM THE STATE OF KENTUCKY

The advice and consent powers of the Senate are a very important part of every Senator's duty and should be taken very seriously. Together with the recent hearing on ideology, this hearing and future hearings will shed light on the role that the Senate should play in the appointment process. Two key issues about this role which have been raised are the standard the Senate should use to determine whether a judicial nominee should be confirmed and the so-called need for political diversity on the bench.

THE BIDEN STANDARD

In 1994, Senator Biden enunciated a standard for use in evaluating President Clinton's nominees. In speaking on the nomination of Rosemary Barkett, Senator Biden stated:

> "I. . .want to make clear a standard which I have adopted. . . .It is a three-pronged standard:
> "First, that the nominee has the capacity, competence, and temperament to be on the court of appeals or trial court.
> "Second, is the nominee of good character and free of conflict of interest?
> "Third, would the nominee faithfully apply the Constitution and the precedents of the Supreme Court?. . .Using this test through 12 years of Republican nominees, I voted to confirm numerous lower court judges who were far more conservative than I am."[1]

[1] Statement of Senator Joseph Biden, Jr., Nomination of Rosemary Barkett, of Florida, to be U.S. Circuit Judge for the Eleventh Circuit. 140 Cong. Rec. S4281, 4282 (April 14, 1994).

THE HATCH STANDARD

The Republicans agreed with this approach for Democratic nominees and, in fact, adopted it in large part when Senator Hatch assumed Chairmanship of the Judiciary Committee in 1995. Speaking of Marsha Berzon, former head of the litigation team of the ACLU of northern California, Chairman Hatch stated:

> "[W]e must generally defer to the President whom the people elected to fulfill the constitutional duties of his office, including the selection of nominees to our federal courts.
>
> "Thus, I believe that this Committee should focus on the qualification of a nominee: honesty, competence, temperament, and the nominee's appreciation for the proper constitutional role of an Article III judge. I believe that both Republican and Democratic nominees who meet these high standards should be confirmed." [2]

We heard no objections from our colleagues across the aisle to these very similar standards that were used to confirm 377 Democrat nominees, a number only five shy of President Reagan's all-time record. Curiously, when we were confirming all these Clinton judges, there were no Democrat calls for placing the burden on Democrat nominees to prove their fitness to serve on the federal bench.

THE "GOLD" STANDARD

But after President George W. Bush was sworn into office and began nominating people to the federal bench, we suddenly heard calls for changing the standard by which we consider judicial nominees. Specifically, after President Bush informed the ABA that it would evaluate judicial candidates after their nomination, and not before, two of my Democratic colleagues on this Committee, in a March 16, 2001 letter to President Bush, protested. They wrote: "We firmly believe that ending the long-established practice of ABA review would dilute the quality of the federal bench. . . .ABA evaluation has been the gold standard by which judicial candidates are judged." [3]

Well, after this March 16th letter, the ABA ratings for President Bush's nominees began to come in.

- Miguel Estrada—"Well Qualified";
- Jeff Sutton—"Majority Qualified/Minority Well Qualified";
- James E. Gritzner—"Well Qualified";
- 1Carolyn Barbara Kuhl—"Well Qualified";
- Charles W. Pickering, Sr.—"Well Qualified";
- Barrington D. Parker—"Well Qualified";
- Dennis W. Shedd—"Well Qualified"

I could go on and on with the list of nominees who have met Senator Schumer and Leahy's ABA "Gold Standard." Indeed, to date, all of President Bush's nominees have met this standard, with every single nominee having received a rating of "majority qualified" or better. And, quite frankly, given the group of accomplished jurists, academics, and practitioners that President Bush has put together, I would have been quite surprised if the ABA had not given them such high marks.

THE DOUBLE STANDARD

Once it became apparent that President Bush's judicial nominees were going to pass the ABA Gold Standard with flying colors, some on the Left again changed the test that nominees would have to satisfy. This time, many of our colleagues across the aisle pronounced that the President's judicial nominees would have to satisfy some sort of ideological litmus test, with only those nominees who were "in the mainstream" being able to serve on the federal bench. And it will be these same Members, along with the always-reliable editorial board of the New York Times, who will be the selfappointed arbiters of "mainstream values." I suspect, however, that their pronouncements on what views lie within the mainstream will be quite different from the views of the average citizen in Kentucky and Kansas and Ohio—places in the "heartland" of America which typify "mainstream" values. In short, this is where the real mainstream lies.

Now, at no great surprise to Members on this side of the aisle, Laurence Tribe recently testified that Republican nominees should bear the burden of proving their

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[2] Statement of Senator Orrin Hatch on the Nomination of Marsha Berzon, of California to the United States Court of Appeals for the Ninth Circuit (July 1, 1999).

[3] Senators Patrick J. Leahy and Charles Schumer, Letter to President George W. Bush (March 16, 2001).

worthiness to be confirmed.[4] So much for any shred of deference to the President's sole constitutional power to nominate. We would now have 50 or 51 co-Presidents who would change their constitutional role from "advise and consent" into "demand and dictate," where they essentially get to re-nominate each and every nominee to the federal bench. After the Biden standard for Democrats, the very similar

Hatch standard, and the recently minted ABA Gold Standard, I dub this new test the "Double Standard" for Republican nominees.

Now, I say this "double standard" was no great surprise to us on this side of the aisle because we had seen some on the left advocate it before when discussing Republican nominees. In 1990, when "arch-conservative" David Souter testified before this Committee, some of our Democrat colleagues stated that he would have to bear the burden of proving his worthiness.[5] And in 1987, when Professor Tribe testified against Robert Bork, he also argued that the burden should be on the nominee.[6] So, I guess it's only natural to have a "double standard" now that we have Republican nominees again.

Well, if we Republicans had adopted that same standard for President Clinton's nominees, I guarantee you we would have confirmed far fewer than 377 of his nominees. In the end, we should use the same standard for Democrat and Republican nominees: If they are men and women of integrity, are qualified, have a judicial temperament, and will follow the Constitution and statutes as they are written and intended, we should confirm them.

POLITICAL DIVERSITY AND BALANCE

Finally, calls for "ideological diversity"-and the use of litmus tests which this approach necessarily entails-are really thinly-veiled demands for blocking judicial nominees in the name of political diversity-not racial diversity, mind you, but political diversity. Well, the Constitution already provides for such diversity by empowering the President, not us, to nominate judges to the federal bench. Over time, Presidents from different political parties will nominate members of their own party to the bench. This will result in political, and hence ideological, diversity on the federal bench.

The current composition of the federal bench provides an example of this. With respect to active-status federal district and appellate court judges, there are about 400 Democrat-appointed judges and about 330 Republican-appointed judges. That translates into 55% of the judges being Democrat appointees, while only 45% are Republican appointees. Moreover, most of the judges who will be retiring and taking senior status over the next 4 years will be those who were appointed by Presidents Reagan and George H.W. Bush ten, fifteen, and even twenty years ago; not those whom President Clinton appointed in the last few years.

And this statistic shows something else. Now, I don't subscribe to the premise that there is some sort of constitutional requirement of "equivalency by party" with respect to federal judges. As an aside, after five consecutive terms of FDR and Harry Truman, there is no way there was anything close to "political equivalency" on the federal bench when these men were in office. But for those of my Democrat colleagues who believe there is such a rule, they do not have standing to raise this issue, at least not until a whole lot more Republican judges are confirmed. About 70, by my count. Right now, we have a grand total of four, inclusive of Roger Greg-

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[4] Judicial Confirmations 2001: Hearings Before the Subcomm. on Administrative Oversight and the Courts Comm. on the Judiciary, 107th Cong. —(2001) (testimony of Prof. Laurence Tribe at *13) ("[T]he burden must . . . be on the nominee. That burden must be to persuade each Senator . . . that the nominee's experience, writings, speeches, decisions, and actions affirmatively demonstrate not only the exceptional intellect and wisdom and integrity that greatness as a judge demands but also the understanding of and commitment to those constitutional rights and values and ideals that the Senate regards as important for the republic to uphold. ").

[5] 136 Cong. Rec. S14343 (1990) (statement of Sen. Biden) ("I believe the burden of proof is on the nominee. Just as the burden is on the President to convince the American people to vote for him to be President, is on every Senator and Congress person to convince the people in their State to vote for them to have this power, it is also a burden that is on the nominee to be given such awesome power for a lifetime. Any future nominee who fails to meet that burden—and I emphasize again how close I believe this nominee came to that line—will be vigorously opposed, at least by this Senator. ").

[6] Nomination of Robert H. Bork to be Association Justice of the Supreme Court of the United States, Hearings Before the Comm. On the Judiciary, 1001 Cong. 1273-72 (1987) (testimony of Prof. Laurence Tribe) ("It is crucial to remember that Judge Bork is not on trial before the Senate; at stake is not simply his future but the Constitution's future. Thus the Senate's advice and consent function counsels placing the burden of proof on those who urge confirmation. Theirs should be the burden of dispelling the considerable doubts this nomination has raised, both before the nominee testified and in light of his testimony.").

ory. It is apparent, then, we have a lot of work to do before this diversity argument is even ripe for consideration.

Thank you.

Chairman SCHUMER. Thank you, Senator McConnell.

Senator Kyl, also, welcome, a member of the full committee.

STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Thank you, Mr. Chairman. I welcome your courtesy in welcoming those of us who are on the full committee, but not the subcommittee, to this hearing. I shall be very brief, in return, and not really ask witnesses questions, but I would like to do two things.

One, I welcome our old friend, Paul Simon, back. There isn't anyone with whom I have served in the Senate on the Democratic side of the aisle for whom I have had more respect. I miss your service here, Senator Simon.

I appreciated the part of what I heard both of you say and the second thing I want to do is just to express a caution and a concern. All of us are saying this in one way or another, but part of the problem with this hearing, I respectfully suggest, Mr. Chairman, is that it is in the context of news stories which reported that at a conference of Democrats, erudite law professors suggested that the way that Democrats in the Senate could kill President Bush's nominees was to change the ground rules.

What we have seen is an attempt, through op eds, through speeches on the floor, and now through hearings here in the Senate, to make a case that two specific traditions should be changed. The first is that it should become quite appropriate to consider the political philosophy of nominees as a prerequisite to determination of their qualifications, and the second is to, in effect, change the burden of proof, that the burden now becomes that of the candidate.

It seems to me that when the President, through the use of the ABA and his vetting process and the FBI and the consultation that, I agree with Senator Simon, should take place—he has, in effect, presented the case-in-chief, to analogize to a case. The burden of going forward with the evidence is then on the Senate. If there is a matter that through our investigation we believe disqualifies a candidate, we have the burden of laying that out in our questions to the witness and of pursuing that in the various ways that we have. But it would be inappropriate to analogize to carrying the burden of a case.

So that troubles me with this particular hearing. I regret that because I am going to have to be on the floor on the business that is pending on the floor, I won't have an opportunity to hear the witnesses speak to that issue, but I have reviewed some of their testimony in that regard.

I will just close with this point, and if Senator Simon wishes to comment on it, I would be very pleased to get your remarks. One of the most interesting things in the first hearing was Lloyd Cutler's citation, in fact quotation of a question always asked by this Committee of every nominee, the effect of which is, has anybody asked you how you would rule on a specific case or a specific issue.

The whole point is anybody that has done that has crossed the line. We don't want nominees who have promised that they would rule a certain way on a particular case. Yet, that is inevitably where this new line of thinking takes us, to a query of the nominee, how that nominee would rule in a particular case, in order to determine judicial philosophy and in order to have that candidate carry his or her burden of proof. That, I submit, is a very dangerous path.

I think we should retain the question that says has anybody asked you how you would rule on a particular case, and we should be very careful, as Senator Simon said, about how we word any questions to get to the qualifications of the nominee to be very clear that we are not trying to determine how the nominee would rule on a particular set of facts in a particular case. I think that would lead us down a very dangerous path.

If you wish to comment on that, fine, but I have made my point. Again, Mr. Chairman, I appreciate your courtesy in allowing us to be here.

Chairman SCHUMER. Thank you, Senator.

Mr. SIMON. I would make just one general observation, and that is for our free system to function we have to exercise self-restraint. When Richard Nixon lost to John F. Kennedy, he didn't say let's get people out in the streets and protest. He very reluctantly said congratulations. Hubert Humphrey and Richard Nixon, the reverse. So self-restraint has to be used by this body, by the courts, and by everyone in a free system if the free system is to function effectively.

The public should not perceive that we are doing things for partisan purposes. Now, we are all partisans and we are proud to be partisans, but the national interest is what has to prevail. Here, we have to ask the question how do we build a court system that is really a solid, good court system that will give justice to our people. That is the bottom line.

Thanks for hearing me.

Chairman SCHUMER. Well, thank you, Senator, and I just want to echo what you said. I would think that what we are talking about here would apply no matter who was President, no matter who controls the Senate. I don't think there has been much of a change.

I am compelled to just add a few things to the record before you go because—

Senator KYL. Mr. Chairman, might I submit a statement for the record?

Chairman SCHUMER. Please. Without objection.

So many of my colleagues on the other side said this is a dramatic change. I don't think it is a change at all. I think we are just taking something that was under the table and bringing it above.

I would just like to quote, for instance, Senator Lott, on the floor, last year. He said about two judges up for court of appeals, "I have no doubt that these two judges are fine lawyers and technically competent," meeting the standards that we talked about before. But he went on to say, "It is an extremely liberal circuit. It will get worse with these two nominees. This is one of the reasons I

have been hesitant to bring them up." This, of course, was when he was Majority Leader.

Let me read some quotes, without names, from some of my colleagues a few years back. It is not a change; we are just trying to do this in a more civil and above-board way. One of my colleagues said, "We need to send the President of the United States a message that those members of this body in helping select nominees cannot in good conscience continue to accept nominations to a circuit who are not going to make it better and bring it back into the mainstream." That colleague went to the floor and argued that the proposed nominee was "too liberal." That is ideology. Many colleagues voted with him in that regard.

Another one: "The general judicial philosophies to the Federal bench reflect the judicial philosophy of the person occupying the White House, the Oval Office. And differences in judicial philosophy have real consequences for the safety of Americans in their streets, homes and workplaces." And they went on to say that it should be the Senate that should invoke that different judicial philosophy to block the President.

One more: "Whatever the case"—this was on burden; this was because a nominee was regarded philosophically as out of the mainstream by this Republic Senator—"Whatever the case, the Senate will need to be especially sensitive to this problem when it provides advice and consent on nominations to fill court vacancies." The nominees will need to demonstrate exceptional ability and objectivity, he went on to say, to overcome that their philosophy was, in his regard, out of the mainstream. Those are from some colleagues, including some of my colleagues who are sitting here today.

This is not an attempt to be a partisan hearing. Ideology was invoked before. Ideology, judicial philosophy, is legitimate to be invoked today. But because, in my judgment at least, and the judgment of many Democrats and Republicans, we have been reluctant to talk about it, we talk about delay, we talk about the balance of circuit, we talk about something in their past. I believe it is a legitimate inquiry, and so did many members of this committee, some of whom are sitting here today.

Senator HATCH. Mr. Chairman?

Chairman SCHUMER. I would just say I would like to continue this hearing in a way of general inquiry, in a way to figure out how we can do best here to provide the best judges, not with litmus tests, not with the New York Times editorial page or the Louisville Courier editorial page, which has a similar philosophy, as I understand it, making—

Senator MCCONNELL. There is no difference.

[Laughter.]

Chairman SCHUMER.—the determination, but with each of us making the determination and bringing a little more respect to the process than we have. I am not blaming one party or the other for doing it. What we are trying to do is lay out some ground rules that we can debate whether they are appropriate, but at least we are debating them instead of taking it out on individual nominees when they come forward.

Senator HATCH. Mr. Chairman, I really appreciate those remarks and I believe that is your purpose in holding these hearings. I hope that is your purpose and I believe it to be. And you have told me that it is, so I appreciate those remarks.

But let's understand one thing. There have always been some on both sides who have tried to bring ideology into these matters. One of my most difficult 6 years was the last 6 years as Chairman of this committee, where we put through 377 of President Clinton's judgeship nominees, 5 less than the all-time record, which was Reagan, who had a Republican Senate for those 6 years. President Clinton had a Republican Senate for 6 years, but it was the opposite party. And, yes, there were some who honestly felt that ideology played a role in some of these things, but they were beaten because we were able to pass virtually every one of those Clinton nominees.

Now, I think the point I am making is this: anybody who says, and that includes some of our law professors here today, words to the effect that political ideology ought to determine whether a person sits on the Supreme Court or on any court in this country, if they are otherwise qualified, I think that ideology is a very dangerous ideology to be preaching because if we ever get to a point where liberals vote against conservatives and conservatives vote against liberals in a knee-jerk fashion because we differ in philosophy and ignore the fact that the President has this power of nomination and ignore the credentials of the people who are nominated, then I think we are going to have a rough time getting really qualified people to serve in the Federal courts anywhere in this country.

It is tough enough as it is, as Senator Thompson has pointed out, with the pay scale the way it is where law review graduates make more money than Supreme Court Justices to start. Now, that is what I am concerned about, and I am concerned about some of our ideological law professors in this society who actually believe it, who don't like the fact that Clarence Thomas made it or helped to defeat Robert Bork, or you can mention any number of others who had difficulty.

I remember when Justice Souter was up how many on the left were decrying the fact that this unknown person from New Hampshire should sit on the Court because he was going to be a conservative. Well, he has been proven anything but a conservative on the Court, an honorable, decent man who is doing the best job he can.

So I am concerned about it because I don't want to see this devolve into a Democrat/Republican ideological litmus on a political basis in any way, shape or form, because if it does, then I think that this country which has been saved by the Federal judiciary for many, many years is going to have difficulties it never dreamed or never imagined.

So I personally want to say I appreciate you holding these hearings and elevating this discussion to the point of should we play politics, should politics play a role, should politics be determinant and all of these other collateral issues that pertain thereto. I think that you are doing a service, but I am going to fight very hard to make sure that whoever is President has the respect for that power called the nomination power from this body as long as I am here.

So I just hope that I have made myself clear on this.

Chairman SCHUMER. I thank the Senator. The only response I would make before we dismiss our good friend is this: I think what has made it hard to get judges to go to the court is not a discussion of judicial philosophy. They do that everyday. They are happy to answer questions about it. I think both parties have done it.

I think what has made it hard is when we deny that that is the case and instead we go deep into their past and try to find little "gotcha" things that have made them look bad before their families and everybody else. Politics is one thing, judicial philosophy is another.

Senator HATCH. That is right.

Chairman SCHUMER. I certainly agree with Senator Thompson. I don't care if the person is a Republican or a Democrat. I do care if I think their philosophy, as have most members of this committee, is so far from the mainstream that they can't well represent the American people. That is the question here and it is an ongoing discussion. I thank Senator Simon for coming and I will call forward the second panel.

Mr. SIMON. I thank you and I thank the other members of the subcommittee.

Chairman SCHUMER. Senator, thank you.

Senator HATCH. Nice to see you, Paul.

Senator SESSIONS. Mr. Chairman, as they gather, with regard to your discussion about the Ninth Circuit, our concern was that they were outside the judicial mainstream based on the fact that the Supreme Court had, I believe, the previous year reversed them 27 out of 28 times, and another year 13 out of 16. They had by far the highest reversal rate in the country.

Senator Hatch took the view that that shouldn't make any difference; each nominee to that circuit should be given the same deference as any other circuit. I concluded that it was important to try to make sure that the nominees, and send the message to the President that the nominees should be faithful to the judicial mainstream. In fact, the New York Times wrote that a majority of the Supreme Court considered the Ninth Circuit to be a rogue circuit. So it was a real matter of interest at the time. Basically, those nominees, though, were all confirmed.

Chairman SCHUMER. And I would just say to Senator Sessions that is why we are having these hearings to clear up the difference between Senator Hatch and himself, but to really discuss that very legitimate issue.

Now, let me call our next panel of witnesses here. We have a very distinguished and broadly based panel, with widely different philosophies, and we expect you to talk about those philosophies. We don't expect you not to. I ask them to come forward. I think what I will do is I will introduce each one as they speak.

Our first witness is Professor Sanford Levinson. He is an internationally renowned constitutional law scholar. He received his bachelor's degree from Duke University, a Ph.D. from Harvard, and a law degree from Stanford, covering almost every region of the country. He currently holds chairs in law and government at the University of Texas, and held posts at Harvard and New York University Schools of Law. He is the author of numerous books, textbooks and articles. He is coauthor of the popular casebook *Proc-*

esses of Constitutional Decisionmaking. He is also the coauthor, with Yale Law School Professor Jack Balkin, of a forthcoming article in the University of Virginia Law Review entitled "Understanding the Constitutional Revolution," which covers some of the territory we intend to address here.

Professor Levinson, your entire statement will be read into the record. We are going to have a question period, and so if you could limit your testimony to the 5-minute clock—we will ask all witnesses to do that so we can finish at a reasonable hour—we would appreciate it.

STATEMENT OF SANFORD LEVINSON, PROFESSOR OF LAW, UNIVERSITY OF TEXAS LAW SCHOOL, AUSTIN, TEXAS

Mr. LEVINSON. Gladly. I do want to take 15 seconds to say how honored I am to be invited here today, and I would like to read just the first paragraph of my prepared statement and then discuss it for the 5 minutes.

I begin with two quotations from members of the Supreme Court itself. The first was written by Felix Frankfurter some 70 years ago, and I quote, "Members of the Court are frequently admonished by their associates not to read their economic and social views into the neutral language of the Constitution. But the process of constitutional interpretation"—and here I would interpolate, in the year 2001; I think we would also add statutory interpretation—"But the process of constitutional interpretation compels the translation of policy into judgment, and the controlling conceptions of the Justices are their idealized political pictures of the existing social order."

A far more recent Justice, Stephen Breyer, has put the matter slightly differently, but he arrives at the same basic conclusion. After first stating that "Politics in our decisionmaking process does not exist," he distinguished what might be termed low from high politics. Thus, he said, and I quote, "By politics I mean will it help certain individuals be elected." And I will interpolate here that he gave this speech before *Bush* v. *Gore*, and I believe that *Bush* v. *Gore* must necessarily be a part of the discussion of the Senate's duties at this time.

In any case, Justice Breyer quickly went on to say that "Personal ideology or philosophy is a different matter. Judges have had different life experiences and different kinds of training, and they come from different backgrounds." Most importantly for our present purposes is Justice Breyer's forthright comment that "Judges appointed by different Presidents of different political parties may have different views about the interpretation of the law in its relation to the world."

What I would like to do in my remaining few moments before the question period is to focus on this very last sentence of Justice Breyer because I believe the very fact that notice was not particularly taken when he gave his speech, that he was thought to be stating what is almost the common sense of the matter, indicates exactly how far we are, for better and perhaps for worse, from the Framers' vision.

The fact is the Framers would have been shocked by the idea that Presidents were political or that Senators were political, be-

cause if there is one thing we know about the vision of the Framers in 1787, it is that they disliked the very idea of political parties. That particular vision of American political possibility lasted somewhere between 7 and 12 years. By the election of 1800, that vision was absolutely in tatters, as indicated in part by the true crisis then—if we thought that the 2000 election was a crisis election, it did not begin to compare to the election of 1800, where there were suggestions to call out the State militia, where it took 36 ballots to break the tie between Thomas Jefferson and Aaron Burr.

This was because, by 1800, there were two parties contending for power. In fact, this was recognized, in effect, by the 12th Amendment which, by separating the stream of electing the President from the Vice President, is, in fact, the recognition that we are a party-based political system.

Indeed, the last thing that John Adams did before he left the presidency was to appoint a series of so-called midnight judges who were Federalists, who were placed in office in part because their idealized political picture of the world, to go back to Justice Frankfurter, was the Federalist vision shared by President Adams and was most antithetical to Thomas Jefferson. The most famous of these appointments, of course, was John Marshall, who is often called the Great Chief Justice.

If we are injecting not only ideology but, to be perfectly candid, political party background, which is what Justice Breyer referred to, I don't believe that this is the injection of something that has not existed heretofore. I don't believe it is even a decline. I believe that the vision in 1787 that one could have a political system without political parties was itself a wrong vision; that the strength of America, as has often been said, is a vigorous contest of political parties.

The political parties, at the their very best, organize themselves around idealized political pictures so that they present different notions not only of public policy, but also different notions of certain constitutional issues. Justice Jackson once referred to the majestic generalities of the Constitution. He was referring to the Equal Protection Clause, the Due Process Clause, and the like.

Senator Hatch, in particular, is well aware that there is a debate which I participated in with regard to the Second Amendment. One can look at the two parties and see quite different views with regard to the Second Amendment. One could see this with regard to other parts of the Constitution. This is our political system, and I commend you Committee for suggesting that we be more candid about recognizing the importance of the idealized political pictures when considering people for lifetime appointments to the Federal judiciary.

[The prepared statement of Mr. Levinson follows:]

STATEMENT OF SANFORD LEVINSON, W. ST. JOHN GARWOOD AND W. ST. JOHN GARWOOD JR. REGENTS CHAIR IN LAW, UNIVERSITY OF TEXAS LAW SCHOOL, AND PROFESSOR, DEPARTMENT OF GOVERNMENT, UNIVERSITY OF TEXAS

Mr. Chairman and Members of the Subcommittee:

I am honored by the invitation of the Committee to present this statement on the criteria that should be applied with regard to confirming nominees for lifetime appointments to the federal judiciary. This responsibility, of course, is truly one of the most awesome responsibilities that Senators have.

I begin with two quotations from members of the Supreme Court itself. The first was written by Felix Frankfurter some 70 years ago: "[M]embers of the court are frequently admonished by their associates not to read their economic and social views into the neutral language of the constitution. But the process of constitutional interpretation compels the translation of policy into judgment, and the controlling conceptions of the justices are their 'idealized political pictures' of the existing social order." A far more recent justice, Stephen Breyer, has put the matter slightly differently but he arrives at same basic conclusion. After first stating that "[p]olitics in our decision-making process does not exist," he distinguished what might be termed "low" from "high" politics. Thus, he said, "By politics, I mean . . . will it help certain individuals be elected?" He quickly went on to say that "[p]ersonal ideology or philosophy is a different matter . . . . Judges have had different life experiences and different kinds of training, and they come from different backgrounds." Most importantly, for our present purposes, is Justice Breyer's forthright comment that "[j]udges appointed by different presidents of different political parties may have different views about the interpretation of the law and its relation to the world."

Justices Frankfurter and Breyer raise the central issue that Senators must face in passing on presidential nominations to the Judiciary: Judges with different ideologies will shape the Constitution in radically different directions, with effects that are likely to be felt for generations to come. Frankfurter himself, for example, was one of the key Roosevelt appointments who together rejected the constitutional learning of seventy years and established the basis of congressional regulatory power and federal-state relations that are still very much being felt to this day.

To be sure, Senators must first make sure that nominees to the judiciary meet certain baselines of professional competence. Frankly, however, this is almost never a serious hurdle. Instead, the crucial question before you is what you believe the Constitution of the United States, at least as interpreted by the Supreme Court, should look like years from now. There is no serious doubt that the executive branch, when submitting nominees, is attempting to shape the Constitution to fit its own guiding vision. You must therefore ask if these nominees offer compelling visions of what our constitutional order truly is (or should be). To vary Mark Antony's famous statement, the good and the evil that these men and women do will live long after they leave the bench.

The original framework of the Constitution presumed that the Senate would play an important role in the judicial appointment process and serve as a necessary check and balance to the power of the Executive. This made sense in 1787, when the Constitution was initially drafted. Subsequent developments in our nation's history, however, make the argument for Senate supervision of the President's judicial nominations even stronger and the Senate's role as a check on presidential efforts to transform constitutional meaning even more crucial.

I emphasize two such developments. First, no one in 1787, even if a supporter of the abstract idea of judicial review, could possibly have contemplated the role that courts would come to play in our political life, including decisions, sometimes in quite minute detail, regarding some of the most important political issues before the country. Even more to the point, situated as they were at the very beginning of the great American experiment, citizens did not understand that the work of judges (and, for that matter, of presidents and members of Congress) would greatly reshape the meaning of the Constitution over time. The Constitution that emerged from the New Deal and World War II, for example, is in many ways a substantially different document from the one that existed in the 1820's, when few people imagined a significant congressional role in helping to regulate a national economy and when the United States was still able to maintain a more-or-less detached posture vis-a-vis the intrigues of world politics. And, of course, it is not only the Congress and the President who today possess powers that would have astonished earlier generations. It is the Judiciary as well. One may celebrate this set of developments or regret them, but they comprise the constitutional system that we live under today. No one denies that it matters who is elected to the Executive or the Congress; it would be equal folly to pretend that the particular identity of those who sit on the federal bench is without consequence with regard to the quality of life and liberty our fellow Americans enjoy, both now and in the years to come.

Second, the authors of the 1787 Constitution assumed that there would be no organized political parties, the very idea of which appalled them. They would therefore surely be astounded to learn that presidents deliberately staff the judiciary with people from their own political party in order to promote a distinctive ideological agenda. Indeed, a testament to the pervasiveness of this development is that Justice Breyer's statement quoted at the outset stirs no contemporary sense of outrage and is, instead, quite properly treated as a truism about the reality of what

might be called constitutional politics. And, unlike the New Deal, this is scarcely a (relatively) recent development. It was, after all, James Madison himself who became, during the 1790's, one of the leading founders of the Democratic-Republican party that vigorously opposed the Federalist Party headed by Alexander Hamilton. The creation of the party system led to the election fiasco of 1801, when it took the House of Representatives 36 ballots to break the tie vote between the Democratic-Republicans Thomas Jefferson and Aaron Burr. The tie was the direct result of the original Constitution's failure to recognize the existence of political parties, and it led, therefore, to the quick adoption of the Twelfth Amendment, which, by separating the electoral tracks for president and vice-president, also served to recognize the legitimacy of the political party system.

Indeed, by 1801 the Framers' original vision of a judiciary free from partisan influence had collapsed, for precisely the same reasons that led first to the struggle in the House of Representatives and then the adoption of the Twelfth Amendment. After all, almost literally the last thing that the outgoing Federalist President, John Adams, did before leaving office was to pack the judiciary with Federalists, confirmed by a lame-duck and popularly repudiated Federalist Senate. Adams firmly hoped that these new judges would use all the powers at their disposal to put stumbling blocks in the way of the feared Jeffersonians. The most famous such appointment is, of course, John Marshall, whose designation as Chief Justice was understood by one and all to be a powerful political statement. Thus, only a dozen short years after the ratification of the Constitution, the practice of linking judicial appointment to possession of the correct party membership and ideological perspective was firmly established. "Non-partisan" simply does not describe the two centuries of nominating and confirming federal judges.——

Both Professors Cass Sunstein and Laurence Tribe, in their earlier testimony to this Committee, have spelled out the role that ideological judgment can legitimately play when considering judicial appointments. I would like to state forthrightly that the point applies to both parties, regardless of whose ox is being gored. In recent years, Republican Senators have put stumbling blocks in the way of confirmation of many of President Clinton's nominees to the judiciary. I cannot offer any other than political objections to this, at least when that opposition was candidly expressed as a good-faith belief that a nominee possessed an unacceptable view of the Constitution. All Senators take an oath to "support" the Constitution, and I have long regarded it as important that everyone-including all elected officials and even ordinary citizens-take seriously their own, non-delegable, obligation to interpret the meaning of the Constitution-and, therefore, to help safeguard what is most important in our constitutional traditions. That means, therefore, at the very least, that every Senator, and particularly those on the Judiciary Committee, must decide what the Constitution, best understood, actually requires in our never-ending quest to realize the great aims of the Preamble and its emphasis on "establish[ing] Justice."

This is, obviously, not an easy task, and, as already acknowledged, reasonable people can certainly disagree. If I disagreed with the Republican opposition to President Clinton's nominees, it was because I do not share their own particular vision of the constitution, not because I think they had a duty to exhibit automatic deference to President Clinton's contrary judgments. Senators of both parties must think through these issues of constitutional interpretation for themselves rather than bow down humbly before a presidential determination as to who should be on the federal judiciary.

It is, therefore, thoroughly legitimate, under the most ordinary of circumstances, for Senators to concern themselves with the direction in which federal judges are reshaping the American Constitution. But these are not ordinary times. Hovering over any discussion of judicial nominations in our day are two central events. The first is that this country is in the midst of a constitutional revolution in areas of federal-state relations and civil rights. Many of the key cases in this constitutional revolution have been decided by narrow 5–4 votes in the Supreme Court. This revolution will be quelled, or it will go into overdrive-with significant consequences for our system of government-depending on the next set of appointments to the federal judiciary.

The second key event is that the occupant of the Oval Office, who by virtue of his position gets to nominate those who will decide the fate of the constitutional revolution, was neither elected by a majority of the American electorate nor, far more to the point, elected even by ordinary operation of our Electoral College system. Instead, he was granted his office by a willful decision of the United States Supreme Court. The five Justices who decided *Bush* v. *Gore*—and who, not at all coincidentally, are the architects of the constitutional revolution whose fate is at stake—put themselves in the remarkable position of making sure that the person charged with appointing their colleagues and successors would be the candidate most sympathetic

to the ongoing revolution. At the risk of stating the obvious, this is not how the constitutional system of checks and balances, including the vision of a Judiciary removed from politics, was supposed to work.

Bush v. *Gore* remains the equivalent of a stinking pig in the parlor. One simply cannot calibrate the responsibility of Senators at this crucial moment in our Nation's history without taking it into account. Senators who share my concerns about the way that the United States Constitution has been rewritten over the last decade and who believe that the Court's intervention in the political process last December was an especially ugly breach of judicial propriety must not ignore its implications for their constitutionally assigned role as partners in the appointments process.

In at least one way the aftermath of the 2000 election was even more disturbing than its counterpart 200 years ago. In 1800 no one doubted that the House of Representatives was the proper body to decide the election dispute. In December 2000, however, we were presented with the spectacle of five Republican judges using their power to shortcut not only the process of counting the votes in Florida but also, in effect, to render irrelevant the possibility that Congress, exercising its powers under both Article II and the Twelfth Amendment, would resolve any continuing disputes and, as in 1800 and 1824, name the president (who, of course, might well have been George W. Bush). One need not accuse them of consciously betraying their oaths of office. But their choice to intervene as they did placed them in a patent conflict of interest: No one could seriously doubt that the five justices in the majority relished the prospect that the White House would be inhabited by a Republican who could, among other things, nominate their successors. And, of course, in December 2000, it appeared that the Senate would continue to be Republican. The very possibility that the five justices were completely sincere in their conscious belief that they decided Bush v. Gore on the basis of the law alone simply underscores the point that judges are human beings like the rest of us, with a propensity to read the Constitution, if at all possible, in a way that provides "happy endings." In this case, the happy ending is a Republican president picking Republican justices to be confirmed by a Republican Senate.

Many law professors, of whom I am one, regard Bush v. Gore as a patently illegitimate decision, shoddily reasoned; and many of us believe that its illegitimacy taints Mr. Bush's own status as our President. Even if there is something to be said for the Senate's extending deference to a President when submitting nominees for the federal bench, that is really quite irrelevant in the present circumstance.

As a practical matter, there is little that one can do about Bush v. Gore. Mr. Bush does indeed occupy the White House, and no one seriously suggests that he ought not be accepted as our President.

But it is absolutely incumbent on those who were properly appalled by the majority's behavior last December to stand vigilant against allowing it to profit from its own wrong by acquiescing to the packing of the federal judiciary with nominees who are committed to extending the majority's constitutional revolution.

The prior testimony of Professors Sunstein and Tribe included excellent discussion of the contours of this ongoing revolution, and I will not repeat their arguments. I am, however, submitting today the text of an article co-authored by Yale Law School Professor Jack M. Balkin and myself, entitled *Understanding the Constitutional Revolution*, which will appear next month as the lead article in the Virginia Law Review. In it we set out our own understanding of the situation that faces us, including the implications of *Bush* v. *Gore* for the appointment process. We do not attack the good faith of those who believe that the current majority manifests a correct constitutional vision. We respectfully disagree, and we present an overview of what we believe to be a far better perspective. No doubt the current majority and its supporters would say that it is our own vision that deserves to be rejected. Perhaps they are right, but the central point is that the adequacy of constitutional vision of judicial nominees should be the primary concern of members of this Committee.

I have emphasized my general agreement with the testimony offered by my friends and distinguished colleagues Cass Sunstein and Laurence Tribe. I do, however, disagree with them in at least one important respect: Both of them evoke metaphors of maintaining (or restoring) "balance" to the Court and achieving the right "mixture" of viewpoints. Each seems to suggest that it is especially important to prevent the Court from becoming too unbalanced in favor of right-wing perspectives. The problem with the imagery of "balance" is that we have absolutely no way to figure out what a proper balance is. Franklin Delano Roosevelt had no obligation to preserve a mixture of New Dealers and opponents of the New Deal in his judicial appointments in the 1940's. His authority to appoint Justices like Felix Frankfurter (and Senator Hugo Black and his Attorneys General Robert Jackson and Frank Murphy, among others) came from his repeated victories at the polls, which sug-

gested, among other things, that Americans viewed as necessary and proper a variety of changes in the basic structure of our political system, ranging from a significantly strengthened Congress to the acceptance of the validity of an elaborate system of administrative agencies charged with implementing congressional enactments. In like fashion, I see no reason (nor did anyone suggest at the time) that President Lyndon Johnson in 1967 should have nominated a conservative (or even moderate) segregationist instead of Thurgood Marshall in order to achieve some balance on racial issues in the increasingly liberal Warren Court. Johnson's 1964 landslide victory, coupled with equally impressive-legislative victories by the Democratic Party in 1964 and 1966, established all the authority that was necessary to promote an agenda of racial equality in naming new members of the federal judiciary. The same thing might be said, incidentally, about the nomination and confirmation of Antonin Scalia during the Reagan Administration, shortly after his smashing victory in 1984 and, equally important, the return of a Republican Senate. The problem today is that George W. Bush lacks precisely this sort of political authority to throw the Court further to the right and to reshape the meaning of the Constitution for generations to come. George W. Bush is not Ronald Reagan, and the disputed election of 2000 is not the landslide of 1984. And, frankly, given the 200-year acceptance of the legitimacy of political parties, Democratic members of the Senate are under no duty to pretend that they are not the majority of this venerable institution.

Whether "balance" is really the issue is underscored by a question raised by Illinois Senator Stephen A. Douglas in one of the most electric moments of our political history, his famous debates with Abraham Lincoln. Speaking of the Court's 1857 decision in Dred Scott, which in effect held unconstitutional the platform of the newly formed Republican Party represented by Lincoln, Douglas noted that "Mr. Lincoln cannot conscientiously submit, he thinks, to the decision of a court composed of a majority of Democrats. If he cannot, how can he expect us to have confidence in a court composed of a majority of Republicans?" Douglas's use of the word "majority" is key, for he is speaking not of "balance" and the propriety of having a Republican voice on the Court. (That, indeed, existed.) Nor would Lincoln have been any happier if Dred Scott had been a 5–4 decision instead of 7–2. Rather, he objected to the fact that the Supreme Court was controlled by persons committed to what Lincoln properly viewed as an odious view of the Constitution. And Douglas recognized that Lincoln was committed to securing a new majority, as in fact he did upon his election to the presidency two years later and his ability to nominate justices who would be confirmed by what had become a Republican Senate.

Focusing on questions of "balance" and "mixture," I am afraid, simply allows us to neglect talking about the real issues before both the Senate and the American public. What should become of the constitutional revolution put in place by the current five-person majority and celebrated, as a "revolution," by such prominent law professors as Northwestern law professor Steven Calabresi? Should the Senate allow the decision in *Bush* v. *Gore* to its proponents a political advantage in carrying that revolution forward?

I offer two final comments about "balance." First, to the extent that "balance" is in fact desirable, the best way to achieve it is through the ordinary political process of shifts in power among the political parties in both the Executive and the Senate. It may be, however, that our ordinary political system is failing us in important respects, for reasons that I would be happy to go into in during the question period.

Secondly, if this Committee does wish to wrestle with such questions as to what constitutes the best "mix" of judges on a court, I would emphasize the importance not only of abstract ideology, but also of what Justice Breyer described as "life experience and different kinds of training." I believe that a significant lack on the current Supreme Court is someone with a significant degree of political experience. The developing custom of appointing to the Supreme Court only persons with prior experience on the bench is, I believe, decidedly unwise, depriving the Court of important perspectives that are the result of real immersion in the political process. Courts in the past have regularly included former senators, governors, cabinet officials, and, in one instance, a former president. We would do well to return to that practice, and this Committee should use its "advisory" role to encourage such nominations.

In one sense, this emphasis on political experience is independent of ideology inasmuch as there are obviously both Democrats and Republicans who would bring rich political backgrounds to the judiciary. But there is at least one connection worth mentioning: Several analysts of the current Supreme Court emphasize a specific ideological theme that runs through many of its decisions, which can accurately be described as a near contempt for politics and politicians. The current Court is composed of a majority of justices, themselves without significant political experience,

who appear to view politicians as simply the agents of private interests and pressure groups, unworthy of trust, coupled with a fear of disorder if the political process is not tightly controlled. (*Bush* v. *Gore* is the most dramatic illustration of this point.) The disdain for other branches of government, and for the wisdom that might be generated by service in this branches, leads the Court to give the impression that only it can be trusted to enforce constitutional values or to think about what the Constitution means. Three important examples of this contempt for Congress are *Flores* v. *City of Boerne*, in which the Court blithely invalidated the Religious Freedom Restoration Act, supported by overwhelming majorities of both Houses of Congress and by the President of the United States; and *United States* v. *Morrison* and *University of Alabama* v. *Garrett*, in which the majority exhibited ill-disguised disdain for the relevance of the many hearings, held over several years, that led Congress to pass the Violence Against Women Act and the Americans with Disabilities Act.

The Supreme Court, therefore, has made its own contributions, together with the tabloid press and cable news shows, to the pervasive cynicism about the political process that is corroding our political system. The voice of an honorable practitioner of the arts of politics would be a valuable addition both in the conference room of the Supreme Court and, indeed, in the written opinions themselves.

I have emphasized the issues posed by nominations to the Supreme Court, but one should not minimize the importance of appointments to what the Constitution deems "inferior" federal courts. Indeed, because of the fact that the Supreme Court hears only relatively few cases in any given year, almost all decisions of the circuit courts are in fact final, not only for the litigants in the particular case but also for the millions of persons who happen to live in a particular circuit. Circuit judges do not enjoy the same degree of freedom as do Supreme Court justices with regard to overruling past decisions, but it would be foolish to ignore the extent to which imaginative and innovative circuit judges can indeed exercise a real influence on legal developments, for good and for ill. No one, for example, could understand the current constitutional revolution without paying due attention particularly to certain judges on the Fourth and Fifth Circuits. This does not mean that the same level of ideological scrutiny should be applied to all nominees at each level of the federal judiciary. It does mean, however, that ideology should not be irrelevant even when considering a nominee to a federal district or circuit court.

Chairman SCHUMER. Thank you, Professor Levinson. I very much appreciate your summary.

Our next witness is someone equally distinguished, although different philosophically

than you are. This is Professor Ronald Rotunda. He is the Albert E. Jenner, Jr. Professor of Law. He is a graduate of Harvard College, Harvard Law School, and he was a member of the Harvard Law Review. He clerked for Walter Mansfield, of the United States Court of Appeals for the Second Circuit, practiced law in Washington, D.C., and served as assistant majority counsel for the Senate Watergate Committee.

He then joined the faculty of the University of Illinois College of Law and at present is a visiting professor at George Mason University School of Law. He has published over 200 legal articles, is the author of a leading constitutional law treatise, and has served as a consultant to several emerging democracies, including Cambodia and Eastern European countries, helping them craft constitutional, legal and judicial codes.

Professor Rotunda, like all the other witnesses, your statement will be read into the record and you may proceed as you wish for 5 minutes.

STATEMENT OF RONALD D. ROTUNDA, PROFESSOR OF LAW, UNIVERSITY OF ILLINOIS COLLEGE OF LAW, CHAMPAIGN, ILLINOIS

Mr. ROTUNDA. Thank you very much. I really wish my mother-in-law were here to hear that. Behind every married man is an amazed mother-in-law.

First, as a matter of judicial ethics—I teach ethics as well as constitutional law—the general rule has always been, and it is in the ABA ethics rule and I think all of the States have adopted it, that a candidate for judicial office, whether elected or appointed, should not "make pledges or promises of conduct in office, other than the faithful and impartial performance of the duties of the office."

I think it is wrong for a nominee to promise to vote a certain way, promise to adhere to a particular philosophy. The Senate should not confirm anyone who would make such promises. I have talked to people who have gone through the vetting process for the first President Bush. None of them were asked such questions, at least the ones I talked to. I can't believe President Clinton or his aides would do that. I think Senators should find out from the nominees if they have made such promises and should reject those who have made them.

Professor Larry Tribe, whose ears must always be ringing at the hearing today, whom I quote in my paper, said regarding Justice Kennedy he is conservative on a great number of issues. "I don't have any illusion he will be a liberal, but he shouldn't be opposed just because of that."

I don't think nominees should make any of these promises. I think that consideration of ideology should not be over the table, under the table, or through the table. It is something that shouldn't be done. Various Democratic commentators like Lloyd Cutler have urged that as well.

I think that you ought to be guided by three standards. First, we want the independence of our Federal judiciary. The business of judging is not treated as outcome-based; it is not like an election or like a football team. Tell me who won. That is all we want to know.

Second, we want fair courts. We don't want liberal courts, we don't want conservative courts, we don't want balanced courts. We want fair courts. "Fair" doesn't necessarily mean that they reflect what most of the people want, or we never would have had *Brown* v. *Board of Education*. By "fair" I mean judges who call them as they see them, not because of the politics of the next election. They worry about the next generation.

Thirdly, I think neither the Senators nor the President should be asking nominees how they are going to vote on particular outcomes, and if they do, the nominees shouldn't answer.

Should we change the system? If it ain't broke, we don't change it, is the general principle. We have today the most respected judiciary in the world, bar none. I have gone around the world. A member of the supreme court of Moldova said, "I don't know much about your system, but I know yours is the one we want to emulate." That is why they asked for an American to be their constitutional adviser; Cambodia the same thing. These people were imbued in French law, but they said, "No, we want to be like America

because we respect your judges." We are at the top of the food chain and when something is successful, we normally don't change it.

A third point: I think it is erroneous to believe that judges rule as either Democrats or Republicans once they are on the bench. In *Roe* v. *Wade*, this controversial decision for many years, a dissenter was a Democratic appointee, Justice White.

Judge Harry Edwards, a respected professor, as well as a judge on the D.C. Circuit, did a very interesting empirical analysis of the circuit. He concluded that couldn't predict how they were going to vote based on their appointments.

I have talked to a lot of lawyers. I deal with a lot of lawyers in litigation. What they want is a judge who is open-minded, and they often don't know who appointed the judge, whether it was a Republican or a Democrat.

Finally, history should teach us to be more humble. When we try to predict, we are just wrong. The National Organization for Women last May, I believe, had a big demonstration. They were upset that Justice O'Connor might retire soon and they didn't like her replacement, whoever that might be. But earlier, when she was nominated, they were against her.

When Justice Powell was nominated, the president of NOW testified that Powell's confirmation would mean "justice for women will be ignored." When Stevens was nominated, NOW testified that Stevens had "blatant insensitivity to discrimination against women." If NOW were a baseball team, it would be batting zero.

Presidents are just as unsuccessful as NOW. There is nothing about that organization that makes it stand out. President Roosevelt appointed both Felix Frankfurter and William O. Douglas. They had different judicial philosophies.

I think, frankly, that most candidates for judgeships don't know what their philosophy is when they start judging and it changes everyday. That is why we can't give it to computers; we want people who learn over time. One of the examples in my paper was Judge Friendly. Judge Friendly wrote an article on how an issue should be decided. When he was a judge, he was in the dissent. When he saw the oral argument, looked at the transcript and read the briefs, he decided he was wrong. The majority quoted Judge Friendly's article. How is that for sticking something in? They were are quoting Friendly against Friendly.

Well, we know he was right because he was on both sides of the issues, so he has to be correct at least part of the time. But the point was that you could look at that quote and you would think I know how he is going to rule as a judge. He didn't know how he was going to rule as a judge until he actually ruled, and the best judges are like that.

Thank you very much.

[The prepared statement of Mr. Rotunda follows:]

STATEMENT OF RONALD D. ROTUNDA, THE ALBERT E. JENNER, JR. PROFESSOR OF LAW, UNIVERSITY OF ILLINOIS COLLEGE OF LAW, AND VISITING PROFESSOR OF LAW, FALL, 2001, GEORGE MASON UNIVERSITY SCHOOL OF LAW

INTRODUCTION

I thank the Subcommittee for inviting me to express my views. I am the Albert E. Jenner, Jr. Professor of Law at the University of Illinois College of Law, where I researched and taught Constitutional law and Legal Ethics for over a quarter of a century. This fall, I am Visiting Professor of Law at George Mason University School of Law.[1]

Let me begin by making several points on which I will elaborate at the end of this paper.

FIRST, IF IT AIN'T BROKE, DON'T FIX IT. We have today—and we have had the entire Twentieth Century—the most powerful and respected judiciary in the world. I have traveled from Cambodia to Moldova as a Constitutional advisor to newly emerging democracies. Foreign lawyers admire our legal system. Even if they do not fully understand our system, even if the Commissars had kept them in the dark, they know that it is the system that they would like to emulate.[2]

That sentence bears repeating because I am paraphrasing judges, lawyers, and politicians in Eastern Europe, Far East Asia, and South America. They all say that they want their judicial systems to be like our federal system. They want their judges to be like our judges. The lawyers in South America were familiar with our system, the lawyers formerly under Communist domination were not, yet they knew that it was our system that they wanted to copy. They were all more familiar with the French Civil Law system, but they wanted to copy our system, not the French.

In Moldova, for example, a member of the Supreme Constitutional Court told me that, years earlier, when he was writing his dissertation on Comparative Constitutional Law, he had to secure special permission to travel to Moscow to read the Czech Constitution, which was under lock and key at the time—although Czechoslovakia was then a Communist country, and hardly a model of Western democracy. This Moldovan Justice knew nothing about our system except that he wanted to copy it. He knew that if the Commissars were concerned with the destabilizing influence of the Czech Constitution, they were overwhelmed by the American Bill of Rights.

Our judicial system is at the top of the food chain, and that is a good reason to leave well enough alone. Given the fact that the Senate has been confirming federal judges for years, and the product is admired around the world, one wonders why we should think of changing the way the Senate confirms.[3] There is no reason to change presumptions or change the way the confirmation process works when the present system has produced—over a period that spans several lifetimes—the best judiciary in the world. Granted, some judicial decisions are not immediately accepted. The one person, one vote decisions, fall in that category,[4] but now they are part of the warp and woof of our Constitution. Our federal judiciary is independent by design of the framers of our Constitution. An independent judicial system means that sometimes judicial opinions will be unpopular, and we must accept that.

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[1] A complete resume is on file with the Subcommittee

[2] *See, e.g.*, Ronald D. Rotunda, *Exporting the American Bill of Rights: The Lesson from Romania*, 1991 U. ILL. L. Rev. 1065 (1991); Ronald D. Rotunda, Eastern European Diarv: Constitution-Building in the Former Soviet Union, 1 THE GREEN BAG, 2D SERIES 163 (Winter 1998).

[3] E.g., Vikram Amar, How Do You Think?: Ideology and the Judicial Nominee, Legal Times, July 9, 2001, at 50, arguing that the Senators should ask the nominees "various hypothetical or not-so-hypothetical cases," with questions that are "concrete," and based "on actual live controversies." This author even argued that the Senators should take into account a "lawyer's decision to take a case that he knows will involve the making of certain kinds of arguments that may be probative of his beliefs."

I disagree: we should not judge lawyers by their clients. Lawyers have every right (and duty) to defend members of the Communist Party or the KKK, although they strongly disapprove of those organizations. "Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse." ABA Model Code of Professional Responsibility, E.C. 2–27. Lawyers may defend guilty people and secure their acquittal.

The fact that a lawyer takes such cases and is successful in his legal arguments is not "probative of his beliefs." We do not judge lawyers by their clients.

[4] Philip Kurland, Egalitarianism and the Warren Court, 68 MICH. L. REV. 629, 677 (1970) (attacking the one person, one vote cases); ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 174 (1970) (same); ALEXANDER BICKEL, SUPREME COURT, supra, at 59 (criticism of poll tax case); ARCHIBALD COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM 125 (1968) (same).

SECOND, IT IS A COMMON, AND ERRONEOUS BELIEF THAT JUDGES RULE AS DEMOCRATS OR AS REPUBLICANS ONCE THEY ARE ON THE BENCH. THAT IS FALSE. The judges are human, to be sure. They put on their robes, two legs at a time. But they act in good faith in coming to their conclusions, and they do not vote based on the election returns. They know that their ultimate judge is history, not the politics of the moment. We want fair courts—not liberal courts, not conservative courts, not moderate courts, but fair courts, and by "fair," I mean we want judges who will call them as they see them, without regard to politics.

Let us take the D.C. Circuit, for example. I have heard it said that the D.C. Circuit is one of the most partisan, and that one can predict how the case will come out when you know which judges are sitting on the three-person panel. That is the popular notion and it is wrong. A former law professor, Harry Edwards, the highly respected judge of the D.C. Circuit, studied this issue as only a scholar would. He studied the cases and the votes of the judges based on the President who appointed them. Based on the facts, Judge Edwards concluded that the judges did not act as Democratic Judges or Republican Judges but as judges. He strongly objected to "a growing perception that federal judges decide cases on political grounds . . . ." This view, he said, is not only simply wrong, and a "myth," but it tends to undermine public confidence in the judicial process."[5]

THIRD, COMMENTATORS, PRESIDENTS, AND SENATORS MAY THINK THAT THEY CAN PREDICT HOW A NOMINEE WILL VOTE ONCE THAT PERSON IS CONFIRMED, BUT OUR HISTORICAL EXPERIENCE SHOULD TEACH US TO BE MORE HUMBLE. We do not know what will be the major legal issues ten, fifteen, or even five years from now, much less what might be the "liberal" or "conservative" answer to them. We cannot predict with any accuracy. History has repeatedly taught us that lesson.

For example, the National Organization for Women recently rallied in Washington, D.C., demonstrating because of their concern that Justice O'Connor might retire soon and were concerned about her replacement.[6] However, when President Reagan appointed her, NOW was substantially less enthused. When Justice Powell was nominated, the President of NOW testified that Powell's confirmation would mean that "justice for women will be ignored . . . ."[7] When Justice Stevens was nominated, a different President of NOW testified that Justice Stevens has "blatant insensitivity to discrimination against women."[8] If NOW were a baseball team, it would be batting zero.

Similarly, civil rights lawyer Henry L. Marsh III testified at the Powell confirmation hearings about Powell's "record of continued hostility to the law, his continual war on the Constitution."[9] That is not the Justice Powell that any of us would recognize.

Presidential batting averages are equally poor, as I explain more fully below. President Roosevelt appointed both Felix Frankfurter and William O. Douglas, two Justices who were both thought liberal before they were appointed. The same President appointed both men, and once they were on the bench, they were as alike as oil and vinegar.

FOURTH, IT IS COMMONLY REPEATED THAT THE COURT HAS BECOME MORE CONSERVATIVE OVER THE YEARS AND THAT PRESIDENT CLINTON DID NOT APPOINT LIBERAL JUDGES. I DO NOT BELIEVE THAT THE RECORD SUPPORTS THAT ROUTINE ASSERTION. Elsewhere, I have written[10] on the difficulties of these labels, "liberal," and "conservative," and so I will resist mightily the effort to repeat myself. Let us look at a few facts.

During the last two terms on the Supreme Court—during just these last two terms the Court invalidated a state law that intruded on the parental relationship

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[5] Harry Edwards, Public Misconceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D. C. Circuit, 56 COLO. L. REV. 619 (1985) (emphasis added).

[6] Charles Lane, O'Connor Denies Plans To Leave Supreme Court, WASHINGTON POST, May 2, 2001, at A9: "The National Organization for Women rallied to a recent demonstration in Washington in part by warning that O'Connor was about to step down."

[7] NOMINATIONS OF WILLIAM H. REHNQUIST AND LEWIS F. POWELL, JR.: HEARINGS BEFORE THE SENATE COMM. ON THE JUDICIARY, 92d Cong., Ist Sess. 424 (1971).

[8] NOMINATION OF JOHN PAUL STEVENS TO BE A JUSTICE TO THE SUPREME COURT: HEARINGS BEFORE THE SENATE COMM. ON THE JUDICIARY, 94th Cong., 1st Sess. 227 (1975).

[9] NOMINATIONS OF WILLIAM H. REHNQUIST AND LEWIS F. POWELL, JR., SUPRA, AT 389–90.

[10] See RONALD D. ROTUNDA, THE POLITICS OF LANGUAGE: LIBERALISM AS WORD AND SYMBOL (University of Iowa Press, 1986) (with an Introduction by Daniel Schorr).

by mandating grandparents' visitation rights.[11] This same Court threw out state laws that interfered with federal power over international affairs,[12] and motor vehicles.[13] The Court upheld federal privacy laws that regulated state motor vehicle departments and placed upon them the same restrictions imposed on private parties.[14]

There are those who complain that the present Court is too deferential to the states, although some prominent Democratic law professors say otherwise.[15] Yet, this same Court has shown that, when it is protecting civil rights and liberties, it is willing to override both state or federal laws and regulations to meet that goal. The Court is neither liberal nor conservative as those labels are commonly used because the Justices are not politicians.

There are many other examples one can cite. Justice Scalia, which the popular culture typically portrays as conservative, voted twice to protect burning the American Flag as free speech.[16] Justice Stevens, which the media tells us is liberal, dissented in both of those two cases.[17]

A few months ago, this Supreme Court voted unanimously to reverse the Ohio Supreme Court and hold that a witness who denied wrongdoing still had a constitutional right to assert the privilege against self-incrimination.[18] I do not think that this and similar decisions can be explained by any facile reference to politics.

Justice Scalia recently wrote the opinion that banned warrantless searches using hightechnology heat-seeking devices.[19] By the way, Justice Stevens wrote the dissent.[20] Some commentators cannot understand this line-up and complain that Justice Scalia is acting not true to form. Perhaps the problem is the commentators. When they cannot put a square peg in a round hole, the problem may not be the peg, but the commentators who have predicted that the square peg will be round, and are upset that their prediction is incorrect.

It is interesting that the year after Justice Scalia was appointed to the Court, Professor Larry Tribe became one of his fans:

> So far I find myself more in agreement with him than with any other justice this term. His opinions show a degree of care and attention to the actual issues before the Court that is refreshing and I wish was shown by others on the Court. The clarity of his analysis so far puts him in a class by himself.[21]

AND FIFTH, AS A MATTER OF JUDICIAL ETHICS, JUDGES AND CANDIDATES FOR JUDGES MAY NOT PROMISE TO VOTE PARTICULAR WAYS ON

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[11] *Troxel* v. *Granville*, 120 S.Ct. 2054 (2000).

[12] *Crosby* v. *National Foreign Trade Council*, 120 S.Ct. 2288 (2000).

[13] *Geier* v. *American Honda Motor Co.*, 120 S.Ct. 1913 (2000).

[14] *Reno* v. *Condon*, 120 S.Ct. 666 (2000).

[15] While some Democratic commentators have made this argument, it is interesting that former Acting Solicitor General Walter Dellinger appears to have rejected it. The new federalism cases still leave Congress with considerable legislative power, but, Mr. Dellinger was quoted as saying, it will be more difficult for Congress to enact legislation that is "more appropriate to county commissions than to a national government." Former acting Solicitor General Walter Dellinger, quoted in, Mary Deibel, Court Cutting Federal Role, CHICAGO SUN–TIMES, June 25, 1999, at p. 35.

Professor Laurence Tribe has supported an even broader view of states' rights. He has argued for "islands in the stream of commerce" that would be immune from federal regulation. Tribe, Federal-State Relations, in 4 JESSE CHOPER, YALE KAMISAR & LAURENCE TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1981–1982, at 164 (1983). See also LAURENCE TRIBE, CONSTITUTIONAL CHOICES 125–32 (1985).

[16] *Texas* v. *Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *United States* v. *Eichman*, 496 U.S. 310, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990).

[17] Stevens, J. claimed that the majority's opinion would allow vandals to spray graffiti on the Washington Monument. 491 U.S. at 436, 109 S.Ct. at 2556 (Stevens, J., dissenting). However, Congress owns the Washington Monument and can prosecute those who defile it as an ordinary trespass. Texas did not prosecute Johnson for trespass, disorderly conduct, arson, theft of flag, vandalism, etc. Rehnquist, C.J., joined by White (a Democratic appointee) & O'Connor, JJ., filed a blistering dissent that included long excerpts quoted from poems (such as Ralph Waldo Emerson's "Concord Hymn"' "and John Greenleaf Whittier's "Barbara Frietchie") hailing the flag.

[18] Ohio v. Reiner, 121 S.Ct. 1252 (2001) (per curiam). The Court comes out this way because the Justices act in good faith without regard to political labels.

[19] *Kyllo* v. *United States*, 121 S. Ct. 2038; 150 L. Ed. 2d 94 (2001), holding that when the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment "search," and is presumptively unreasonable without a warrant, under the Fourth Amendment.

[20] Stevens, J., filed a dissenting opinion, in which Rehnquist, C.J., and O'Connor and Kennedy, JJ., joined.

[21] Professor Tribe, quoted in, Adler, Scalia's Court, AMERICAN LAWYER, Mar., 1987, at 20.

PARTICULAR CASES. Any person who is a candidate for appointment to a judicial office "shall not"—

> make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.[22]

It is wrong for a nominee to promise to vote a certain way, to promise to vote to overrule or to not overrule a particular precedent, or promise to approach a legal problem with a particular mind set.

The Senate should not confirm anyone who should make such promises. I have talked to people who went through the vetting process under former President Bush and none of them were asked such questions. I cannot believe that President Clinton or his aides would have asked such questions, nor that such questions would be asked in the vetting process under President George W. Bush.

Senators should not vote for or against a nominee because of predictions (often wrong) of how that nominee might vote on legal questions. As Professor Larry Tribe has advised, regarding Justice Kennedy, "He's conservative on a great number of issues. I don't have any illusions he will be liberal. But he shouldn't be opposed just because of that." [23]

I think it is permissible to ask nominees if they have made any promises—other than " the faithful and impartial performance of the duties of the office"—to the President or to any Senator. If the nominee has made such promises, then the Senate should know what they are. But I believe that neither the Senate nor the President may or should seek such promises; the Senate should not confirm someone who treats the judicial office as an elected office. If judges are no different than politicians, the people should elect them directly.

As various Democratic commentators have advised, we should not oppose judicial nominees because of our predictions of how their legal views might mature over the years, and we should not ask nominees to promise to vote a particular way on legal issues.[24] And, as former White House Counsel Lloyd Cutler under President Carter and President Clinton, and former Representative Mickey Edwards (R., Okla.) have recommended: "the president and the Senate must not ask for, and the candidate not offer or consent to give, any pre-commitments about unresolved cases or issues that may come before them as judges." [25]

Lloyd Cutler & Mickey Edwards, Avoiding a Political Dead End on Judges, Scripps Howard News Service, Aug. 24, 2001, reprinted in, http://www.nandotimes.com/opinions/v-text/stoDL/6601 1 p-941658c.html?printer%20

In short, Senatorial questions to nominees ought to be guided by three standards:

- FIRST, it is essential that the independence of the courts be preserved. This means that the business of judging cannot be treated as though it is solely outcome-based, i.e., who wins and who loses on a particular policy issue.
- SECOND, we want fair courts—not liberal courts, not conservative courts, not moderate courts, but fair courts, and by "fair," I mean we want judges who will call them as they see them, without regard to politics. And,
- THIRD, neither Senators nor the President should ask nominees about particular issues and outcomes because nominees should only promise the faithful performance of their judicial duties.

With that introduction, let me turn in more detail to some interesting history that may, hopefully, put the present issues in perspective.

OUR EARLIER TRADITIONS

It has only been in relatively recent times that the Senate has subjected nominees to wide-ranging confirmation hearings, yet it has always been a given that the

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[22] ABA MODEL CODE OF JUDICIAL CONDUCT, Canon 5A(3)(d)(i). See, RONALD D. ROTUNDA, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY §§ 62–2 (ABA–West Group, St. Paul, Minnesota, 2000) (jointly published by the ABA and West Group, a division of Thompson Publishing); THOMAS D. MORGAN& RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 644–55 (Foundation Press, New York, N.Y., 7th ed. 2000).

[23] HARVARD LAW RECORD, Nov. 20, 1987, at 1, col. 1 (emphasis added).

[24] Ruth Bader Ginsburg, Inviting Judicial Activism: A "Liberal " or "Conservative " Technique?, 15 GA. L. REV. 539, 553–57 (1981); Smith, Involving the Judiciary in Pdlitical Campaigns, 66 A.B.A.J. 1318 (1980) (American Bar Association's House of Delegates declare that it disapproves of "any [political party] platform plank" that deviated from the selection of judges on the basis of merit by requiring a test of the candidate's "particular political or ideological philosophies."); HARVARD LAW RECORD, Nov. 20, 1987, at 1, col. 1, quoting Professor Larry Tribe.

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nominees do not make promises other than the faithful performance of their judicial duties. The last threequarters of a century has seen dramatic changes in the style and format of these hearings.

The hearing process used to be much simpler. For example, on September 4, 1922, Justice John H. Clarke resigned. On the very next day, President Warren Harding nominated George Sutherland to the Supreme Court, and the Senate confirmed later that same day.[26] No one would expect the Senate to act so promptly today.[27]

Until 1929, if the Senate Judiciary committee would hold confirmation hearings on the Supreme Court nominee, they would be closed.[28] And, until relatively recent times, the nominee would never appear and testify at the confirmation hearing.

For most of our history, it was considered inappropriate for a judicial nominee to appear in person and testify. The Senate had the duty to advise and consent, but the senators should not directly question nominees about their philosophies. Typically the nominee might be staying at a hotel near the Capitol, where he could respond to questions by sending telegrams or letters to the committee, but he would not personally attend and would not be subject to direct and follow-up questioning.[29]

PERSONAL APPEARANCE

The first nominee who actually appeared in person was Harlan Fiske Stone. Calvin Coolidge nominated Stone on January 25, 1925. In accord with the custom of the time, Stone did not appear before the Senate Judiciary Committee, which approved him unanimously. But Stone had a powerful adversary, Burton K. Wheeler, Senator from Montana, and Wheeler had many friends. Wheeler was under investigation by the Justice Department, and Stone was the attorney general who had asked Wheeler to appear before a federal grand jury in Washington, D.C.

Senator Thomas Walsh, on behalf of Wheeler, persuaded the Senate to resubmit the nomination to the committee. Stone then took the unprecedented step of agreeing to appear before the committee for a narrow purpose: to answer questions about the Wheeler affair, provided that the hearing would be public. On January 28, the committee questioned Stone for nearly five hours. On February 2, in executive session, the committee again sent forward Stone's nomination, and the Senate approved 71 to 6, with Wheeler and the other Montana senator abstaining.[30]

Interestingly, Wheeler later became good friends with Stone; Wheeler believed that someone had lied to Stone, for "that [is] the only way you can account for the handling of the case against me after he became Attorney General."[31]

After Stone's testimony, the Senate reverted to its standard procedure of having confirmation hearings without the nominee's ever testifying. In fact, five years after Stone's appearance, when Herbert Hoover nominated Judge John Parker to the Supreme Court, the Judiciary Committee rejected a motion to allow him to appear the committee and testify![32] Parker had to follow the traditional procedure of answering any charges made against him in writing.[33] The Senate rejected Parker and then approved the next nominee, Owen Roberts.

Felix Frankfurter also broke tradition and appeared before the Judiciary Committee. At first, Frankfurter followed tradition and refused to appear personally before the committee, but after a steady stream of witnesses attacked Frankfurter, his associations, his foreign birth, and his religious beliefs, the committee asked him to appear. He did so, accompanied by his lawyer, Dean Acheson.

Frankfurter began by reading a prepared statement declaring that he would not discuss or express his personal views on controversial issues that were before the Court. He responded to Sen. Patrick McCarran's questions about his patriotism by

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[26] H. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 186 (2d ed. 1985).

[27] When President Clinton left office, there were 41 judicial nominees pending, and 67 judicial vacancies. Today, there are 107 vacancies on the Federal Bench.

[28] 71 CONG. REC. 3039 (1929). It was not until 1981, during the confirmation hearings of Sandra Day O'Connor, that the Senate Judiciary Committee allowed radio and television to be present in the hearing room. See Nina Totenberg, The Confirmation Process and the Public: To Know or Not to Know, 101 HARV. L. REV. 1213, 1213 & n.1 (1985).

[29] See Frank, The Appointment of Supreme Court Justices: Prestige, Principles, and Politics, 1941 Wis L. REV. 172, 200–04 (1941).

[30] A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 188–99 (1956).

[31] A. MASON, supra, at 191 n.*.

[32] W. BURNS, DUTY AND THE LAW: JUDGE JOHN T. PARKER AND THE CONSTITUTION 84–85 (1987).

[33] See, e.g., 72 CONG. REC. 7793–95 (1930).

affirming his belief in "Americanism." His personal appearance was dramatic and brief. He spoke, in total, only for about 90 minutes.[34]

John Marshall Harlan was the third nominee who appeared to testify. Since that time, which only dates to 1955, supreme court nominees have appeared and given testimony. This relatively recent tradition now has become so expected that it would be unheard of for a nominee to refuse to speak before a public session of the Senate Judiciary Committee.

COURTESY CALLS

Another new tradition has developed relatively recently. It has now become the norm for Supreme Court nominees to pay courtesy calls on selected senators. While it is true that Louis Brandeis had an informal dinner meeting with two senators who had expressed doubts on his nomination,[35] the Brandeis meeting was like the Stone personal appearance, viewed as an aberration and not as leading to any new tradition.

Within the last few decades, the new custom for the modern nominee is to walk the corridors of the Senate buildings and meet privately with individual senators. Afterward, a senator may announce to the press that the senator has had doubts answered (or not answered) and will therefore support (or oppose) the nomination. Justice Sandra Day O'Connor, for example, made various courtesy calls reported by the press.[36]

Some commentators have criticized this new convention.[37] What exactly does the nominee say in private? The senators usually do not tell us but merely make conclusory statements. Perhaps that is all that was said. This practice now seems a permanent fixture.

With the advent of personal appearances before the Senate Judiciary Committee, some people think that the senators would use the hearing to glean some knowledge about the nominee's philosophy of constitutional interpretation. Some commentators believe that an often unstated purpose is to know something about how the nominee might decide a controversial issue, such as search and seizure.

Yet, in spite of all the efforts to predict how nominees will rule and in spite of the modern tools now used to try to divine how the nominee will act once confirmed, the batting averages of presidents and senators and the general public have been remarkably poor. We should not be surprised that senators have been no more successful than presidents in predicting how nominees will turn out. The same president—Franklin Roosevelt—who nominated conservative Felix Frankfurter to the Court also nominated liberal William O. Douglas. It may be easier to predict stock market tops and bottoms than to predict how nominees will rule.

The analogy between stock-market watching and Court watching is a useful one. Some money managers develop good short-term records in timing the stock market (i.e., deciding the best times to buy and sell) and predicting the various turns in the market, but it is much harder to develop a consistent long-term record. The market timer must know not only when to sell (when the market is at the top), but also when to buy.

Business school studies typically conclude that it is very difficult—if not impossible—to consistently time and beat the market over the long term. Similarly, it is extremely difficult—if not impossible—to predict with any consistency how Court nominees will turn out.

If a lot of predictions are made, some will be correct. Even a stopped clock is right twice a day. But the president and the Senate do not have the luxury of making a lot of predictions. A president may have only one or two nominations to make (Jimmy Carter had none), and a Supreme Court appointee may sit on the Court for decades. The margin of error in making predictions must be remarkably small. History has shown us that the margin of error is, in fact, quite high.

Joseph Story. Consider President James Madison's appointment of Joseph Story in 1811. Why did Madison choose Story? Madison was a member of the Democratic-Republic party. His mentor, Thomas Jefferson, had defeated the last Federalist to hold the presidency, John Adams. Story, like his father before him, and like Madison, was also a DemocraticRepublican. President Madison probably expected that

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[34] HEARINGS ON THE NOMINATION OF FELIX FRANKFURTER BEFORE THE SUBCOMM. OF THE SENATE JUDICIARY COMM., Jan. 11–12 (1939); L. BAKER, FELIX FRANKFURTER 208–10 (1969).

[35] A. MASON, BRANDEIS: A FREE MAN'S LIFE 503–04 (1946).

[36] Judge O'Connor Talks with Potential Critics, N.Y. Times, July 18, 1981, at 24, col. 1; Mrs. O'Connor Makes the Scene, N.Y. Times, July 19, 1981, § IV, at 4, col. 2.

[37] E.g., Marcy, Nominees Shouldn't Pay Courtesy Calls on Senators, N.Y. Times, July 29, 1981, at A23, col. 3.

the strong-willed Story, already a successful lawyer, politician, and legal scholar, would serve as an intellectual counterweight to the views of Federalist Chief Justice John Marshall. Yet, once on the Court, Story often supported and expanded Marshall's views.[38] Some contemporaries concluded that he even outMarshalled Marshall.

Hugh Black. The difficulty in predicting a nominee's performance is also well illustrated in more modern times by FDR's appointment of Alabama senator Hugo Black. Black was generally viewed as a Roosevelt crony. Black had enthusiastically supported Roosevelt's ill-fated efforts to pack the Court. Black had even once been a member of the Ku Klux Klan. Although he had resigned a dozen years before his Supreme Court appointment, he still received an unsolicited membership card, and many people charged that his resignation was opportunistic; a leopard never changes his spots.[39] But Black surprised his critics.

If the Senators had tried to predict how Black would rule on racial and free speech issues, they most certainly would have guessed wrong, and we would have been deprived of one of the greatest Justices in our nation's history.

Oliver Wendell Holmes. Even short-term predictions are often wrong. President Theodore Roosevelt appointed Oliver Wendell Holmes to the Court and thought he would strengthen federal power over interstate commerce. In one of the first major opinions after Holmes was appointed, the Court upheld federal power but Holmes dissented. T.R. then announced that he "could carve out of a banana a judge with more backbone than that." [40]

Modern Nominees. Dwight Eisenhower appointed William Brennan and Earl Warren, both of whom turned out to be strong liberals. Sandra Day O'Connor was considered a rightwing ideologue. Now the news media and many commentators regard her as a leader of the moderates.[41] O'Connor has also upset those who have disagreed with her votes to allow restrictions on the previously declared women's right to an abortion.

Some Court watchers believe that they can prophesy what a nominee will do by looking at his record. This belief may be a factor encouraging presidents to look primarily at lower-court judges when choosing appointees to the High Court. However, like generals who are always fighting the last war, past practices do not always control the future. We can look to history not for prophecy, but for conjecture.

JUDICIAL PHILOSOPHY

In recent times, Court watchers have also sought to focus on the judicial philosophy of the nominee. Evidence that the nominee will seek to look at the historical intention of the framers of our Constitution is strong evidence, we are told, that the nominee will be too conservative.[42] For example, if a justice would claim that "justices are not platonic guardians appointed to wield authority according to their personal moral predilections," many commentators would see such a declaration as a code word for judicial conservatism. Yet the language just quoted came from Justice William Brennan only a few years ago, in 1985.[43] Brennan, will go down in history as one of our most influential justices. There are those who believe that the Senators should look for code words or phrases to determine a justice's philosophy and that Justice Brennan's reference to judicial restraint—"justices are not platonic guardians"—should be the kiss of death. These people would have voted against Justice Brennan.

Finally, when we seek to predict how a nominee will vote on the Court, we should remember that predictions of what might happen later this afternoon or tomorrow morning are easier than predictions of what will happen in six months or six years.

The stock-market analogy is again instructive here. The amount of money one can make in the market is usually quite limited if one's horizon is measured in just hours or a few days. As finance studies show, buying and holding stock for the long

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[38] See JOSEPH STORY'S COMMENTARIES ON THE CONSTITUTION, at pp. v-xxii. (Ronald D. Rotunda & John E. Nowak eds. 1987).

[39] H. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 359 (2d ed. 1985).

[40] See RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW 171 (West Group, 6'h ed. 2000).

[41] See, e.g., Galloway, Who's Playing Center, A.B.A.J., Feb. 1, 1988, at 42, 45.

[42] See, e.g., M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY iX–X, 101–14 (1982) [judges should seek the "right answers" by going "beyond the value judgments established by the framers of the written Constitution (extraconstitutional policymaking)"]; L. TRIBE, AMERICAN CONSTITUTIONAL LAW iv (1978) (judges should have a "more candidly creative role").

[43] Justice William Brennan, quoted in N.Y. TIMES, Oct. 13, 1985, at 36, col. 2.

term is more profitable than trying to guess the latest zig and zag in the market. The real question is whether one can make money over the long term, and in order to do that, one needs a long-term outlook. It is necessary to act like an investor, not like a speculator.

If we treat the Supreme Court as an investment and not as a speculation, then the president and the senators and the media as well should worry less about how a nominee might vote on any particular issue than about what they think of the nominee's personal integrity, good faith, and intellectual ability.[44] The alternative, trying to predict how a justice will act on particular legal issues for 5 or 10 years from now is difficult, if not impossible. We do not know what the major judicial questions will be 5or 10 years from now. We would be even less successful in forecasting what the liberal or conservative answers to those questions will be.

President Bush has made several nominations already.[45] Some people have criticized some of them as possessing the wrong ideology. I do not know how these nominees will vote on the bench in specific cases, and I doubt that they do either. It is one thing to argue as an advocate for a client and another to decide as a judge. It is one thing to write an article about a legal issue and another to decide a concrete issue with concrete parties.

This simple fact is illustrated by no less a judicial titan than Judge Henry Friendly, a great judge and prolific author. In one case, when one of the parties cited to him one of his own articles indicating how an issue should be decided, Judge Friendly decided that he disagreed with what he himself had earlier written; the genius of the common law system, as he recognized, is that judges must make the decisions in the context of concrete cases, not in the context of law review articles. Judge Friendly dissented,[46] while the majority relied Friendly's law review article.[47]

What I do know of President Bush's nominees is best expressed by another excellent lawyer, Walter Dellinger, who was acting solicitor general in the Clinton administration. After President Bush announced his list, Mr. Dellinger said that, "although he couldn't comment knowledgeably on all the nominees, 'this is a very strong list in terms of professional qualifications.' In particular, he cited John Roberts, a Washington lawyer and Supreme Court practitioner, and Michael McConnell, a University of Utah law professor." [48]

CONCLUSION

As I have explained in this statement, the history of the nomination and confirmation process supports the Senate's current practice of focusing on a nominee's character and ability to follow the law rather than his or her putative political ideology and reputed view on particular politically hot topics of the day. The Senate should continue to play the constitutionally mandated role of reasoned advisor to the President, not prophet, seer, or investigative reporter.

Further, nominees should only promise the faithful performance of their judicial duties. Hence, there should be no presumption against confirmation if a nominee chooses not to answer a politically charged question, or if question requires (or ap-

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[44] In the past, people have argued that Senators should reject a nominee because they disagree with his politics. The history of these instances should teach us to be more meek. Consider the extensive criticism of Justice Brandeis: "The senior Senator from Massachusetts said of Brandeis that he 'may be keen of intellect . . . but his record impeaches him on far higher grounds than those of intellectual ability." McDonald, Supreme Court Nominees: A Look at the Precedents, WALL ST. J., Sept. 16, 1987, at col. 3 (Midwest ed.).

The President of the American Bar Association and six former ABA Presidents agreed that Brandeis was "not a fit person to be a member of the Supreme Court." Id. See generally, A. MASON, BRANDEIS: A FREE MAN'S LIFE 465–508 (1946); A. L. TODD, JUSTICE ON TRIAL: THE CASE OF Louis D. BRANDEIS (1964).

[45] In President Clinton's eight years in office (six of them with a GOP Senate), Clinton had 377 of his judicial nominees confirmed. President Reagan's record was only five higher at 382, despite the fact that he also had 6 years with a GOP Senate. There are those who say that some Republicans hindered President Clinton's appointments of federal judges. Even if that charge is true—and I am sure some people sincerely believe it—President Bush is hardly to blame. He was in Texas attending to state business at the time. Nor are his nominees at fault.

[46] *Williams* v. *Adams*, 436 F.2d 30, 35 (2nd Cir. 1970) (Friendly, J., dissenting). Judge Friendly (the Judge, not the author) was vindicated when the Second Circuit, en banc, reversed the panel decision, in 441 F.2d 394 (2d Cir. 1971) (per curiam). But the U.S. Supreme Court agreed with Henry Friendly, the author, and not Henry Friendly, the judge, as it reversed the Second Circuit. *Adams* v. *Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).

[47] *Williams* v. *Adams*, 436 F.2d 30, 34 n.2 (2nd Cir. 1970), quoting, Henry Friendly, The Bill ofRights as a Code of Criminal Procedure, 53 CALIFORNIA LAW REVIEW, 929, 952 (October, 1965).

[48] Robert S. Greenberger, Bush To Send List of II Diverse Nominees For US. Appeals Courts To Senate Panel, THE WALL STREET JOURNAL, May 9, 2001.

pears to require) the nominee to promise to decide a legal question of particular way, or if he or she believes an answer will compromise (or will appear to compromise) a judge's ability to later make an independent law-based decision. Nominees should not be judged or punished because of the clients that they have represented.

The Twentieth Century has demonstrated that we have the best judicial system in the world, bar none. The Senate has the weighty responsibility to preserve it by not changing the ground rules as we begin the Twenty-First Century.

Chairman SCHUMER. Thank you, Professor Rotunda, for your succinct and pointed testimony.

Next is Judith Resnik. Judith Resnik is the Arthur Liman Professor of Law at Yale Law School. We have never met, but Arthur Liman was a mentor to me. I didn't know that until I read this, but double welcome.

She is also a graduate of Bryn Mawr College and the New York University School of Law. She chairs the Federal Courts Section of the American Association of Law Schools, serves on the ABA Standing Committee on Judicial Improvements, and is a member of the American Academy of Arts and Sciences. She is also an occasional litigator in the Federal courts, including the United States Supreme Court. In addition to being the coauthor of a leading civil procedure textbook, she has written extensively on the role of the Federal judiciary in the 20th century.

Professor Resnik, your entire statement is read into the record. Please proceed.

STATEMENT OF JUDITH RESNIK, PROFESSOR OF LAW, YALE LAW SCHOOL, NEW HAVEN, CONNECTICUT

Ms. RESNIK. Thank you for inviting me to testify. I want to address in these moments two burdens, the burden on the nominee to demonstrate qualifications to serve as a Federal judge and the burden on this Senate as a practical matter to discharge its constitutional obligations of advice and consent.

First, the burden on the nominee. No person is entitled to a life-tenured judgeship. It is a unique charter in this polity. Federal judges ought not to be appointed to be a part of the President's team. That they have the President's endorsement should never be enough alone to turn someone into an Article III judge.

I am using the words "Article III judge" deliberately because I want to draw your attention to all of the life-tenured judiciary, trial and appellate, as well as the Supreme Court. And, here, I will disagree with Senator Simon. There were 300,000 cases filed, a bit more than that, in Federal courts last year, 14,000 trials, 7,000 trials by juries and a comparable number by trial judges. As Senator Thompson told us, trial judges are central, powerful decision-makers. They interpret laws, they understand facts. They put weight on some facts and not on the others.

District Courts are not only our courts of first instance, but by and large, for most people they are the courts of last instance. From about 300,000 trial level cases, some 60,000 appeals are filed. The U.S. Supreme Court decides only about 75 cases a year. So trial and appellate court judges are the judges for our people. Article III judges are at all levels and I hope you will have the energy to take seriously each and every nomination.

Now, there has been a question here about ground rules. The Federal judiciary is changing the ground rules. Tomorrow, I begin a first-year procedure class. I will have to report to my new students that a black-letter rule of law with which I grew up, that courts held a presumption that congressional statutes were entitled to deference and were, expected to be constitutional—that black-letter rule is no longer the rule.

This Supreme Court, by a bare 5–4, time and again, has not accorded the deference due to this body in its lawmaking function. Simply put, Congress has less Commerce Clause powers than it had in 1994. Of the 11th Amendment and 14th Amendment, the same can be said.

At issue are not just constitutional rights, but statutory rights. Recently, we have seen the Federal bench start to treat the Congress as a wayward lower district court, or worse. District Court findings cannot be set aside unless clearly erroneous. Congressional findings have been given less respect in some instances.

This is a time to appreciate that the federal courts are engaged in affecting the meaning and allocation of power in the U.S. Federal system. Some of our trial judges, our life-tenured district court judges, are out ahead of the Supreme Courts interms of narrowing Congressional powers. For example, take the Child Support Recovery Act, passed in 1992, providing that if debt is owed across State lines because of failure to support children, criminal offense may have occurred. Some lower court judges have said that this kind of debt is not within the scope of Congressional commerce powers.

We also have lower court judges saying the Family and Medical Leave Act cannot be applied against States in particular fashions. We have lower court judges saying that when Congress passes an Act under the Spending Clause, that is not a "law" for purposes of the supremacy of Federal law.

So, point one: discussion today has focused on whether this Committee is changing the rules. There are new rules, but they come from the courts, not this Committee, and those new rules are being applied against the Congress.

Point two: the job of the Federal judiciary has changed over the last three decades because, in addition to life-tenured Article III judges, we now have bankruptcy and magistrate judges sitting within the life-tenured Article III courts. I don't have a blue and red chart, such as those provided by others, but I did append a chart in my testimony. You will see fromit about 845 magistrate and bankruptcy judges, statutory judges that sit for limited but renewable terms now at the trial level, along with 646 trial-level life-tenured judges.

So Article III judges don't just adjudicate. They select a group of people, their statutory siblings, who are now larger in number than the number of authorized trial level judgeships. That means that life-tenured judges can reproduce themselves. So when you confirm one judge, you are confirming more, because magistrate judges are selected by the district courts and bankruptcy judges by the appellate courts. In 6 Federal district courts in the winter of 2001, the number of magistrate judges was greater than that of life-tenured judges; in 16, their numbers were equal.

So the second reason for careful scrutiny: the Senate is not just confirming one judge; you are picking judges who now have powers of selection, appointment, and reappointment.

The third point: life-tenured judges have changed the job in another respect. Starting in the last two or three decades, the Federal judiciary has become active in using its corporate voice, taking on the role as an Article III adviser to Congress. The judiciary has started issuing policy statements advising Congress about whether to create new causes of action.

If someone asks—does the Federal judiciary have an ideology? To answer one must look not only at published opinions. One must also read the Long-Range Plan of the Federal courts. Recommendation one of about 90 recommendations is the presumption against the creation of new Federal rights, new civil causes of action, new criminal causes of action. The Judicial Conference of the United States now lobbies, attempting to influence policy decisions. Currently, it urges that a presumption against the creation of new rights.

Given that the judiciary has taken up these three roles: advisor to Congress, appointer of other judges, overseer of Congress, it has never been more important for the Senate to think hard and long about who ought to be joining the bench. The burden ought to be on the person seeking to join the bench. Then, turn to the question about how the Senate exercises an active role. There is an aura of apology around, as if to say: "Oh, dear, isn't it too bad that the Senate is doing this?" I think it is time to stop apologizing. This is one of many great places to develop norms about who we are in the United States, about what we do value, about what we do care.

Take the example of women's rights. Up until 1970, it wasn't discussed in nomination hearings. In the 1970's, it was mentioned, but not important at all. Not until 1987 did it become an aspect of what is expected of people who seek to join the life-tenured bench—that they be fully committed to equal rights for all of us here.

Now, I want to turn to the question of how the Senate discharges its burden. I want to respond to the concern about logistics. I have a practical suggestion, which is that you could develop an advisory Committee of lawyers and citizens, not just lawyers, to help advise this body as it goes about learning about judicial nominees. This proposal is akin to that used by many Senators, who rely on merit selection committees; Governors and States do so as well. Augment your resources: bring in the public. Make it a group of people who can help advise you on these questions.

Now to the question, of whether to ask about judicial nominees' attitudes—call them philosophy, ideology, activism, call it jurisprudential views. This is exactly the question that needs to be asked: Who are these people? What are their attributes? Answers ought not to rely only on the back-and-forth, stylistic questioning. What have they done in their life?

The word "mensch," a Yiddish word is apt here. It means that a person is good person in the world. In this context the focus ought to be on wheather nominees have, for example, provide free legal services to people who need them, or whether they joined in the enterprise of helping this country be true to its values by making the courts accessible to all, such as whether, they have dealt

with problems of handicapped access to the courts, or dealt with problems of bias in the courts. There are hundreds of opportunities for we who are lawyers, law professors and a part of this community to volunteer our time and our energy. You can look objectively at what choices nominees have made as lawyers in this world.

Thank you.

[The prepared statement of Ms. Resnik follows:]

STATEMENT OF JUDITH RESNIK, ARTHUR LIMAN PROFESSOR OF LAW, YALE LAW SCHOOL

Thank you for inviting me to testify. I applaud the Committee for taking the time to reflect on its role in the confirmation' process.

I will speak to two issues: (a) the major transformations within the federal courts during the last half-century that have augmented the powers of life tenured judges, and (b) the contributions that the Senate has made and ought to continue to make when discharging its constitutionally-mandated role of evaluating individuals proposed for life tenured judgeships.

THE FEDERAL COURTS TODAY

Article III judges are unique in this constitutional democracy as they hold their charter for life. Those selected and confirmed to serve must, therefore, be individuals in whom all can have confidence.

I use the term "Article III judges" deliberately, as I hope that your attention and your energies will not be focused exclusively on nominees to either the Supreme Court or the appellate courts. Life tenured district judges are critical and powerful actors as well, and their appointments also merit your full consideration.

Indeed, the saliency and import of the federal judiciary has grown substantially over the twentieth century, with an increase in the number of life tenured judges and with an increase in their docket. Recall that one hundred years ago, in 1901, some 70 district judges sat throughout the country, with a single judge serving entire states, such as Maryland, Massachusetts, and Indiana.

Today, more than 650 authorized judgeships exist in the district courts. In addition, some 180 appellate court judgeships are authorized, and hundreds of senior Article III judges augment this work force.

During the second half of the twentieth century, Congress also authorized two new sets of federal judges—magistrate and bankruptcy judges. These judges sit within the Article III judiciary but do not have life tenure and constitutionally protected salaries; rather they serve for renewable terms. Today, more than 450 magistrate and 325 bankruptcy judges join district judges at the trial level. For clarity, I shall refer to the life tenured federal judges as our constitutional federal judges, and to those judicial officers who work within our Article III courts but without constitutional guarantees as statutory federal judges.

In short, the federal judiciary today looks vastly different than it did, even fifty years ago. Congress has played a central role in this expansion—by authorizing new life-tenured judgeships, by creating auxiliary, statutory judgeships and periodically enlarging their mandates, and by giving new work to the federal courts. According to the Administrative Office of the United States Courts, between 1974 and 1998, more than 470 new causes of action were created.[1]

As a consequence, constitutional judges today have three tasks:

- First, as is familiar, they adjudicate, and their rulings touch our lives in a myriad of ways. Today, the federal judiciary's profile is especially high, with recent rulings that have held unconstitutional several federal statutes.
- Second, constitutional judges now have the responsibility of selecting statutory judges. The district court selects and then decides whether to reappoint magistrate judges; the appellate courts do the same for bankruptcy judges. Recall the numbers; the constitutional trial bench is now somewhat smaller in number than its statutory siblings[2] Indeed, as of 2001, in six district courts, the number of magistrate judges was greater than that of

[1] Administrative Office of the U.S. Courts, Revision of List of Statutes Enlarging the Court Workload (Sept. 17, 1998) (memorandum).

[2] See Chart I, Authorized Trial Level Federal Judgeships in Article III Courts, Nationwide (1999), appended.

life tenured judges;[3] in another sixteen, their numbers were equal.[4] Constitutional judges are thus responsible for the selection, appointment, and reappointment of more than 700 statutory judges. Those chosen to be our constitutional judges therefore not only shape the law through adjudication; they also shape the law by deciding who will serve as our statutory judges.

• Third, the life-tenured judiciary has, over the course of the last several decades, taken it upon itself to advise Congress about the desirability of creating new causes of action, both civil and criminal. That role is new and represents a change in attitude. In the earlier part of the century, the life tenured judiciary thought it inappropriate to provide this form of collective advice on matters of legislative policy.[5] Now, however, through the Judicial Conference of the United States, the Article III judiciary relies on its corporate voice to promote the use of the federal courts for certain matters and not for others.[6] On several occasions, it has urged this Congress not to enact certain causes of action.[7] Constitutional judges have thus taken on a lobbying role, pressing this Congress to enact legislation that comports with a very particular and narrow view of the role of the federal courts.

In sum, when asked to think about whether the current federal bench has a point of view, Congress should turn not only to the judgments rendered but also to the policy positions taken. In 1995, the Judicial Conference of the United States, in its first-ever long-range plan,[8] urged Congress to limit access to the federal courts and to have a presumption against the creation of new civil causes of action and new criminal protections for citizens. And beginning that very same year, the United States Supreme Court, in a series of 5–4 rulings, held unconstitutional criminal and then civil causes of action that this Congress had enacted.[9] The voices that now dominate the federal judiciary surely have a particular ideological stance—against the use of the federal courts for the protection of a wide range of rights and against the enactment by this Congress of new rights for Americans.

Given the multiplying of roles for life tenured judges and the increasingly consistent anti access approach of many sitting jurists, the question of selection of constitutional judges has never been more important. And, given the close divide at the last election and the current split in government, it is incumbent on the Senate to ensure that the federal judiciary as a whole reflects the breadth of concerns in this polity.

THE SENATE'S ROLE: REFLECTING AND ARTICULATING LEGAL NORMS AND VALUES

A first question posed for these hearings is about the Senate's role, and specifically whether the Senate ought to consider the attitudes, judicial philosophy, and ideology of nominees. The Senate's historical practices make plain that it has done so in the past.

I hope I can help make clear that considering the bedrock views of nominees is not only common and unavoidable (albeit often done implicitly) but also to be celebrated as contributing to our legal norms. When attitudes are widely shared, they are not perceived to be "ideology." Only when norms and values are contested do

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[3] As of January 2000, those districts were: the Middle and Southern Districts of Alabama, the Western District of New York, the Eastern and Southern Districts of California, and the Western District of Texas. Telephone interview with staff, Magistrates Division, Administrative Office of the U.S. Courts (Jan. 9, 2001).

[4] Those districts were in New Mexico, Arizona, the Northern District of New York, the Virgin Islands, the Western District of North Carolina, the Middle District of Louisiana, the Northern District of Mississippi, the Western District of Michigan, the Eastern District of Arkansas, the Northern and Southern Districts of Iowa, North Dakota, Idaho, Montana, Oregon, and the Southern District of Georgia. Telephone Interview with staff, Magistrates Division, Administrative Office of the U.S. Courts (Jan. 9, 2001).

[5] Individual judges and justices have, in contrast, often provided their views. See EDWARD PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER & THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH CENTURY AMERICA (2000).

[6] See, e.g., THE JUDICIAL CONFERENCE OF THE UNITED STATES, LONG-RANGE PLAN FOR THE FEDERAL COURTS, reprinted at 166 F.R.D. 49 (1995).

[7] For example, the Judicial Conference warned against enactment of Y2K legislation; it also initially opposed the Violence Against Women Act and then, in 1993, decided to take no position. See Judith Resnik, The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act, 74 SO. CAL. L. REV. 269 (2000). See also Judith Resnik, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III, 113 HARV. L. REV. 925 (2000).

[8] See note 6, supra.

[9] See, e.g., *United States* v. *Lopez*, 514 U.S. 549 (1995); *United States* v. *Morrison*, 529 U.S. 598 (2000).

we think of a set of questions as touching on ideology. The nominations of judges is one place in which legal norms are expressed—and, equally importantly, developed. Through hearings such as this set and those of individual nominees, we learn about and we develop this nation's values.

The important contribution of the Senate—and the work yet to be done—can be illustrated by a brief review of when the question of women's rights became a part of discussions at nominations. It was not until 1970 that a nominee, George Harrold Carswell, was questioned about his attitudes towards women.[10] Congresswoman Patsy Mink from Hawaii called the nomination of Carswell "an affront to the women of America;" she cited his role in a case upholding the refusal to employ women with children of pre-school age, although men with children of pre-school were so employed.[11] When Senator Birch Bayh of Indiana asked Judge Carswell to address "the impression that [Carswell was] not in favor of equal rights for women," Carswell responded that he was committed to the enforcement of the "law of the land."[12]

The Carswell nomination was rejected, but not because of Carswell's views on women's role in society.[13] The following year, when William Rehnquist and Lewis

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[10] Over the past 200 years, some 140 individuals have been nominated to the Supreme Court. See THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES at 965–971 (Kermit L. Hall ed., 1992). Information about nominations first became generally available in 1916, when the Senate Judiciary Committee held public hearings and published a report on the nomination of Louis D. Brandeis, the first Jewish justice on the Supreme Court. See Preface to Volume I, ROY M. MERSKY & J. MYRON JACOBSTEIN, THE SUPREME COURT OF THE UNITED STATES: HEARINGS & REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE (Hein, 1977 & supp.) (16 volumes compiled by Mersky and Jacobstein). For an understanding of the confirmation process during the nineteenth century, the records of which can be found in the National Archives, see John P. Frank, The Appointment of Supreme Court Justices: Prestige, Principles, and Politics, 1941 WIS. L. REV. 172 (part I), 343 (part II); 461 (part III) (addressing late nineteenth as well as twentieth century appointments).

While public hearings occurred in the Brandeis nomination, Brandeis himself did not testify. Harlan F. Stone was the first, in 1925, to testify on his own behalf before the Senate's Committee on the Judiciary. Id. According to the Committee notes, the invitation was extended at 10:00 a.m., and Mr. Stone, then

Attorney General, appeared at 11:30; "he was interrogated by a number of the members of the Committee. The proceedings are in the form of transcript, taken by a stenographer." Special Meeting of the Full Committee on Stone Nomination, Jan. 28, 1925, Committee on the Judiciary, U.S. Senate, Minutes, 1923–25, 68th Cong., Records of the U.S. Senate, Record Group 46, National Archives (Washington, D.C.). However, that testimony is not reproduced in the Mersky and Jacobstein compilation nor listed as available in the Library of Congress holdings. Transcripts are also not readily available from the period when women's suffrage was much before the public, culminating in the passage of the Nineteenth Amendment in 1920. Moreover, according to Mersky and Jacobstein, not all of the Senate Judiciary Committee proceedings since then have been made public.

In the later part of the twentieth century, more research materials became available. A review of hearings on Supreme Court nominees beginning in the 1960s reveals that the first questioning about women's rights occurred at the Carswell hearings. See Hearings before the Committee on the Judiciary on the Nomination of George Harrold Carswell of Florida, to Be an Associate Justice of the Supreme Court of the United States, U.S. Senate, 91st Cong., 2d Sess. (January 27, 28, 29, February 2 and 3, 1970) [hereinafter Carswell Hearings].

[11] Carswell Hearings, supra note 10, at 81–82. Carswell's role in that case was quite limited; he was a member of an en banc panel that denied rehearing in *Phillips* v. *Martin Marietta Corp.*, 416 F.2d 1257 (5th Cir. 1969) (en banc), in which Ida Phillips claimed that the company had violated her Title VII rights by declining to give her, a mother of pre-school age children, a job not denied men with pre-school age children. The Fifth Circuit concluded that the policy did not discriminate against women but was based upon "the differences between the normal relationships of working fathers and working mothers to their pre-school age children." *Phillips* v. *Martin Marietta Corp.*, 411 F.2d 1, 4 (5th Cir. 1969). That decision was reversed and remanded by the Supreme Court. *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 544 (1971).

[12] Carswell Hearings, supra note 10, at 40–41.

[13] According to one historian of the proceeding, criticism of Carswell centered on his general lack of distinction as well as his 1948 pro-segregation stance, later repudiated. See, e.g., JOHN P. FRANK, CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT 103–106 (1991). Frank noted Congresswoman Mink's opposition, but in his view, the "real sticking points were civil rights and competence." Id. at 113. Frank also discussed the political context, a democratically-controlled Senate distressed at the forced resignation of Abe Fortas, which animated the unsuccessful nomination of Clement Haynsworth (in Frank's view, unfortunately rejected) as well as that of Carswell (in Frank's view, appropriately rejected). Id. at xiv. 19, 28, 44, 94–95, 102–03. In May 1970, the Senate approved, with 94 affirmative votes (and 6 absentees), the nomination of Harry Blackmun as an associate justice. Id. at 124. No questions were addressed to Blackmun about his views on women's rights during the brief one-day hearing. Hearings before the Committee on the Judiciary, U.S. Senate on Nomination of Harry A. Blackmun to be an Associate Justice of the Supreme Court of the United States, U.S. Senate, 91 st Cong., 2d Sess. (Apr. 29, 1970).

Powell were nominated to be associate justices, several witnesses objected to both nominees' attitudes towards women's rights.[14] While such testimony prompted Senator Bayh to ask William Rehnquist about his views on equal rights for women,[15] no such questions were addressed to Lewis Powell.[16] A nominee's attitudes towards women's rights played a minor role in the hearings, and did not become a subject of analysis by those commenting on the nomination process.[17]

The hearings on the nomination of Robert Bork, in 1987, were the first in which women's issues moved to center stage and became relevant to the outcome.[18] Many witnesses questioned Judge Bork's interpretations of constitutional doctrine to exclude women from heightened protection under the Fourteenth Amendment,[19] as

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[14] See Hearings before the Committee on the Judiciary, United States Senate, on the Nominations of William H. Rehnquist, of Arizona, and Lewis F. Powell, Jr., of Virginia, to Be Associate Justices o/the Supreme Court of the United States, U.S. Senate, 92d Cong., 2d Sess. (November 3, 4, 8, 9, and 10, 1971) [hereinafter, Rehnquist and Powell Hearings]. Objections were raised about William Rehnquist's testimony while he was in the Justice Department on the Equal Rights Amendment (ERA) and the Women's Equality Act (id. at 428–29) and about Lewis Powell's failure, as a leader of the American Bar Association, to take stands on issues affecting women. Id. at 423–25, 428–33, 433–36. See also testimony of Catherine G. Roraback, president of the National Lawyers' Guild, id. at 460 (under Powell's leadership, the ABA was silent on equal rights for women). Barbara Greene Kilberg, of the National Women's Political Caucus, testified not about the nominees but about the absence of a female nominee (id. at 421–23), a topic that had been in the news, prompted in part because of President Nixon's statements that "qualified women" should be considered for the two vacancies. James M. Naughton, Harlan Retires, N.Y. TIMES, Sept. 24, 1971, at 1.

[15] In 1971, as Assistant Attorney General in the Nixon administration, Rehnquist had testified before the House Judiciary Committee; the testimony is somewhat ambiguous but in some respects supported the ERA. See Federal Rights for Men and Women 1971, Hearings before Subcommittee No. 4 of the Committee on the Judiciary on H.J. 35, 208, and Related Bills, House of Rep., 92d Cong., 1 st Sess. 323 (1971) (Representative Wiggins noting that while the "administration is positively committed to the support of this constitutional amendment," it also said that the amendment was "not necessary").

When testifying as a nominee to be an associate justice before the Senate Judiciary Committee, William Rehnquist declined to state his personal view on the ERA. When asked his view on the rights of women under the Fourteenth Amendment, he responded that it "protects women just as it protects other discrete minorities, if one could call women a minority." Rehnquist and Powell Hearings, supra note 14, at 163. Thereafter, noting that some of the issues were pending before the Court, he declined to address additional questions on women's rights. Id. at 164.

[16] According to a biography of Justice Powell, when confronted by "a group of women's rights activists," he responded: "Ladies, I've been married for thirty-five years and have three daughters. I've got to be for you." JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 233 (1994). As Professor Jeffries describes it, the "crucial issue was not gender but race." While Justice Powell had resigned his memberships in all-white clubs, concern was raised about his role in the "(non)desegregation of the Richmond schools." Justice Powell's defense was to rely on endorsements by a variety of individuals attesting to his efforts to respond calmly to the complex problems of school integration, his work with the all-black National Bar Association, and his commitment to fairness. Id. at 235–236.

[17] See, e.g., HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT, 20–22 (3d ed. 1992); Hearings before the Committee on the Judiciary on the Nomination of John Paul Stevens to Be a Justice of the Supreme Court, U.S. Senate, 94th Cong., 1 st Sess. (Dec. 8, 9, 10, 1975); Hearings before the Committee on the Judiciary on the Nomination of Judge Antonin Scalia, to Be Associate Justice of the Supreme Court of the United States, U. S. Senate, 99th Cong., 2d Sess. (Aug. 5, 6, 1986) [hereinafter Scalia Hearings]; Hearings before the Committee on the Judiciary on the Nomination of Justice William Hubbs Rehnquist to Be Confirmed as Chief Justice of the U. S. Supreme Court, 99th Cong., 2d Sess. 114 (July 29, 30, 31, Aug. 1, 1986).

The nominees did not respond with detailed defenses or point to their efforts to enhance women's participation in the political, economic, and social life of the country. Indeed, Justice Scalia defended his membership in an all-male club on the grounds that although the club did discriminate by excluding women, that form of discrimination was not "invidious." See Scalia Hearings at 91 (also commenting that a judge should not belong to a club that "practices invidious discrimination"). Justice Scalia resigned his membership in that club; he explained that several factors influenced his decision, including that "I was uncomfortable at doing something which, although I thought it was perfectly OK, was offensive to friends whose feelings I am concerned about." Id. at 105.

[18] See generally ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (Norton, 1989); Martin Shapiro, Interest Groups and Supreme Court Appointments, 84 NW. U.L. REV 935 (1990).

[19] Hearings before the Committee on the Judiciary on the Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States, 100th Cong., 1st Sess. 160–161 (Sept. 15–30, 1987) [hereinafter Bork Hearings]. One case that received attention was *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), which involved a challenge to a statute making it a crime to prescribe contraceptives. Robert Bork had called the statute a "nutty law," and then, at the hearings, described the case as an "academic exercise." Bork Hearings at 114, 240–243;

Continued

well as his decisions in nonconstitutional cases. Judge Bork's opinions caused concern about his capacity to appreciate problems from the perspectives of women litigants.[20] While many factors contributed to Judge Bork's rejection, his belief that discrimination against women was not directly prohibited by the Equal Protection Clause of the Fourteenth Amendment,[21] his opposition to the Equal Rights Amendment,[22] and his narrow construction of statutory rights for women played an important part.

The effects were visible three months later, when Anthony Kennedy was before the Senate seeking confirmation to the seat denied Judge Bork. The discussion of women's concerns took a notably different turn. Judge Kennedy made a point of affirming his commitment to women's rights. He explained in some detail his growing understanding of the issue; he described his unsuccessful efforts to change the policy of the all-male club to which he had belonged and his subsequent resignation.[23] As he put it, "Over the years, I have tried to become more sensitive to the existence of subtle barriers to the advancement of women and minorities in society. This was an issue on which I was continuing to educate Myself"[24] Similarly, in 1990, when David Souter was questioned by the Senate Judiciary Committee about sex discrimination, he rejected the application of only a rational basis test to sex discrimination, and he noted the "difficulty" with the "looseness" of the "heightened scrutiny" standard applied to discrimination on the basis of sex.[25]

Stuart Taylor, Jr., The Bork Hearings: Bork Tells Panel He Is Not Liberal, Not Conservative, N.Y. TIMES, Sept. 16, 1987, at A1, col. 6. See generally Andi Reardon, *Griswold* v. *Connecticut*: Landmark Case Remembered, N.Y. TIMES, May 28, 1989, at 12CN, p.6, col. 5 (describing the efforts of Estelle Griswold and Charles Lee Buxton to lobby the Connecticut legislature to repeal that law and their subsequent arrest for operating a clinic that openly dispensed contraceptives to poor women; Yale law professor Thomas Emerson, who had argued the case, explained its import as one of the early recognitions of a constitutionally based right to privacy).

[20] For example, while on the Court of Appeals for the District of Columbia, Judge Bork wrote a unanimous opinion for a panel of three judges in which that court upheld, against a challenge under the Occupational Safety and Health Act, a company policy that required women of childbearing potential to be sterilized if they wanted to hold jobs exposing them to chemicals alleged to cause harm to reproductive capacities. Oil, Chem. and *Atomic Workers Int'1 Union* v. *American Cyanamid Co.*, 741 F.2d 444 (D.C. Cir. 1984). Judge Bork's opinion described the company's plan as an attempt to deal with "unattractive alternatives" and wrote that rather than firing women, the company had given them "a most unhappy choice" of sterilization. Id. at 445, 450.

At the confirmation hearings, the question was whether Bork's discussion evidenced understanding of the stark options put to women workers: be fired, demoted, or sterilized. When questioned, Judge Bork commented that "some of [the women], I guess, didn't want to have children." Bork Hearings, supra note 18, at 468. Compare SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 450 (1991) (quoting Betty Riggs's letter to the Senate: "Only a j udge who knows nothing about women who need to work could say that. I was only twenty-six years old, but I had to work, so I had no choice . . . . This was the most awful thing that ever happened to me. I still believe it was against the law, whatever Bork says"). In 1991, the United States Supreme Court ruled that, given evidence of the potential for harm to the reproductive systems of both men and women if exposed to lead, Title VII and the Pregnancy Disability Act prohibit employers from banning only women of childbearing capacity from certain jobs. See *Int'1 Union, United Auto., Aerospace & Agric. Implement Workers of America* v. *Johnson Controls*, 499 U.S. 187 (1991).

Further, the Bork Hearings also addressed an opinion by Judge Bork on sexual harassment, in which he had written about "sexual dalliance" and "sexual escapades," choosing language that could be read as making light of an atmosphere in which sexual compliance was allegedly required. *Vinson* v. *Taylor*, 760 F. 2d 1330, 1330, 1332 (D.C. Cir. 1985) (Bork, J., dissenting from the suggestion for rehearing en banc), panel opinion affd in part and rev'd in part sub nom. *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57 (1986).

[21] Judge Bork argued that the Fourteenth Amendment was addressed to race and ethnicity, not to gender, and that rules relating to race should not and could not be transposed to gender, because "our society feels very strongly that relevant differences exist and should be respected by government" (referring to single-sex bathrooms and women in combat). See ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAw 328–331 (1990).

[22] Bork Hearings, supra note 19, at 161–162 (Bork explained that his opposition was not heated; he had not "campaigned" against the ERA, but he did believe it would be inappropriate to "put all the relationships between the sexes in the hand of judges.").

[23] Hearings before the Committee on the Judiciary on the Nomination of Anthony M. Kennedy to Be Associate Justice of the Supreme Court of the United States, U.S. Senate, 100th Cong., 1st Sess. 23 (Dec. 14, 15, 16, 1987) at 104–11.

[24] Id. at 105.

[25] Hearings before the Committee on the Judiciary on the Nomination of David H. Souter to Be an Associate Justice of the Supreme Court of the United States, U.S. Senate, 101st Cong., 2nd Sess. 75–76, 106 (Sept. 13, 14, 17, 18, 19, 1990). Judge Souter responded generally to questions about women's rights with discussion of the legal tests that govern the Equal Protection Clause and privacy. Id. at 53–57. Senatorial concern about these issues is also evident in the Senate's report on the nomination; in his "additional views" on the nomination, Senator Biden

With this review of questions put to Supreme Court nominees over the past two decades, one can learn something about the useful role that "ideology" played and the contributions that the Senate has made through the hearing process. Up until 1970, women were invisible in the hearings. Then, during the 1970s and through most of the 1980s, women were but a minor footnote. The change comes in the late 1980s. Through nomination hearings, as well as through several pieces of legislation, the Senate has helped women to become equal rightsholders under the United States Constitution.

I wish I could report that the work is over. But the substance of those rights remain in dispute, and some of the nominees who will come before you are likely to support women's rights only at a very general level of abstraction. In 1994, Congress enacted a major civil rights act for women, the Violence Against Women Act; in 2000, by a 5–4 majority, the Court found one section of it unconstitutional.[26] Lower courts are concluding that the Family and Medical Leave Act cannot be applied against states and finding the Child Support Recovery Act beyond Congress's power.[27] And, last term, the Supreme Court, 5–4, upheld the constitutionality of differential treatment of children depending on whether their mother or their father is a citizen of the United States.[28] At issue in case after case are women's rights to privacy, to be free from violence, to be both wage-workers and care-givers. Debate continues about what level of scrutiny applies to gender-based classifications. Therefore, as each and every nominee comes up for appointment, to the district or the appellate courts, the Senate must continue its work of shaping legal norms to ensure women's equality.

More generally, the Senate should view the nomination process as an important venue for discussions of equality in the courts, in terms of the demography of the judiciary, treatment of litigants, lawyers, and witnesses, and the legal doctrine. One obvious concern is for diversifying the judicial work force so that those who sit in judgment reflect more of the characteristics of those whom they judge. And here again, while some progress has been made, more is needed. It is not that the struggle for what Judge Leon Higginbotham has called "judicial pluralism"[29] has been won or that affirmative efforts to do so are popular, but that hostility to pluralism is no longer plausible. Whether from the left or the right, political parties speak of the need for inclusion, as they prominently display individuals of both sexes and of a variety of races and ethnicities as emblems of their commitment to inclusion.

But what does diversity mean, and is inclusion enough? The Senate should be concerned not only that women and men ofall colors come before it as nominees but also that those candidates view the law—both statutory and constitutional—as having an affirmative role to play in expanding opportunities for all.

The Bork nomination was a watershed in other respects. The Senate's extensive public questioning of the nominee prompted a vigorous debate about the meaning of the Senate's constitutional obligation and about the effects of the public nomination process. At that time, like today, debate focused on whether the power to provide both "advice and consent" ought to mean that the Senate should presume it will consent. Further, assuming a substantive role for the Senate, the issue raised was whether senators could inquire directly about what was then termed "judicial philosophy" and what is now called "ideology"—or whether "judicial temperament" and "professional competence" were the only permissible topics.

Reviewing the nominations both before and since the Bork hearings, I hope that the question about the Senate's role can now be understood as settled. As Charles Black explained some years ago, no reason—"textual," "structural," "prudential," or "historical"—exists for objecting to reading the Constitution's words "advise and consent" as authorizing senators to take an active role in shaping the federal judici-

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noted that Souter had demonstrated a "commendable concern" for ensuring sufficient constitutional protection for women's rights. NOMINATION OF DAVID H. SOUTER TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, S. EXEC. REP. 101–32, 101 st Cong., 2d Sess. 28–30 (Oct. 1, 1990).

[26] *United States* v. *Morrison*, 529 U.S. 598 (2000) (holding that Congress lacked power under either the Commerce Clause or the Equal Protection Clause to enact 42 U.S.C. § 13891, the Civil Rights Remedy.) The remainder of this legislation remains, and in 2000, Congress reauthorized its many important provisions.

[27] See, e.g., *Chittister* v. *Dep't of Community and Economic Dev.*, 226 F. 3d 223 (3d Cir. 2000); *Sims* v. *University of Cincinnati*, 219 F.3d 559 (6th Cir. 2000) (both Family and Medical Leave Act); *United States* v. *Faasse*, 227 F. 3d 660 (6th Cir. 2000), vacated en banc, 234 F. 3d 312 (6th Cir. 2000) (decision en banc pending); *United States* v. *King*, 2001 WL 111278 (S.D.N.Y. Feb. 8, 2001) (both Child Support Recovery Act).

[28] See *Nguyen* v. *INS*, 121 S. Ct. 2053 (2001).

[29] See A. Leon Higginbotham, Jr., Seeking Pluralism in Judicial Systems: The American Experience and the South African Challenge, 42 DUKE L. J. 1028 (1993).

ary.[30] As I have just detailed, in recent years, the Senate has used that role to illuminate both the ideas and beliefs of an individual nominee and the concerns of the nation.

Rather than apologize, I hope that the Senate will embrace the constitutional structure. We should all applaud the insights of the Constitution to build in roles for both the Executive and the Senate. Through these layers of repeated inquiry, first by the President's staff and then by the Senate, power is distributed. The Senate should not hesitate to engage nominees in careful exploration of their views, their work experiences, and their commitments.

This series of hearings has also focused on a related question: whether nominees ought to be asked to make an affirmative showing or whether they come with a presumption of confirmability. No such presumption ought to attach. The Article III judiciary is conceived as independent of both Congress and the Executive. Federal judges are not and ought not to be selected to be apart of the President's "team." When Presidents select a broad and diverse group of nominees who in turn represent a wide spectrum of views, senatorial concern might relax, but when presidents pick a narrow band, such choices ought to prompt "heightened scrutiny."

Searching inquiries are necessary today for two reasons. First, we are in the midst of a significant debate about the meaning of federal law. To preview questions that I understand will be central in the next hearings of this Committee, the meaning of "our federalism" (to use Justice Black's phrase from *Younger* v. *Harris*[31]) is deeply contested. By way of a simple summary, today the Commerce Clause has been read to mean something different than it did in 1994[32] The same can be said for both the Eleventh and Fourteenth Amendments.[33] These new interpretations all come by virtue of decisions made by a bare majority on the Supreme Court.

What is at stake in the appointment of life tenured judges is not only constitutional rights but also the many statutory rights crafted by Congress. Historically, a shared view was that courts were obliged to defer to congressional judgments; doctrinally, this view was expressed by the rule that federal statutes were entitled to a presumption of constitutionality. That presumption is entirely proper, marking the constitutionally shared power of the branches of the federal government to make the meaning of federal law.

But, as I begin to teach my students tomorrow about the federal courts, I cannot report to them that this presumption remains intact. Members of the federal judiciary have undermined it substantially, as they strike federal statute after federal statute. As Justice Breyer put it in his dissent last term in the Garrett case, the five-person majority of the Supreme Court is treating the record developed through hearings in this Congress "as if it were an administrative agency record" and substituting its own evaluation for that of this legislature.[34] Several of the majority's decisions are what I term "factless," by which I mean that they are filled with abstract theoretical claims about constitutional structure rather than grounded in the experiences of litigants, the materials produced through congressional hearings, and the detailed facts within the records.

That approach ought not be one to which anyone aspires. As the Senate considers nominees to the federal bench, it ought to inquire about their attitudes towards the job of judging. Rather than presume them appropriate for the judiciary, assess what they have done, as lawyers and as judges. Further, when considering individuals, the Senate ought also to assess the wisdom of their joining the specific courts for which they have been proposed. I also hope that you will think about the nominees as a group and reflect upon the degree to which they bring to the bench diverse experiences as lawyers, involved with the full range of legal and political activities rather than drawn from only a limited sector. We need individuals who have been lawyers for all kinds of people. The ranks of the judiciary ought to include prosecu-

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[30] See Charles L. Black, Jr., A Note on Senatorial Consideration of Supreme Court Nominees, 79 YALE L. J. 657, 664 (1970). See generally PAUL SIMON, ADVICE & CONSENT: CLARENCE THOMAS, ROBERT BORK, AND THE INTRIGUING HISTORY OF THE SUPREME COURT NOMINATION BATTLES (National Press, 1992); David R. Strauss & Cass R. Sunstein, The Senate, the Constitution, and the Confirmation Process, 101 YALE L. J. 1491 (1992); Robert F. Nagel, Advice, Consent, and Influence, 84 Nw. U. L. REV. 858 (1990); Judith Resnik, Changing Criteria for Judging Judges, 84 NW. U. L. REV. 889 (1990); Paul A. Freund, Appointment of Justices: Some Historical Perspectives, 101 HARV. L. REV. 1146 (1988).

[31] 401 U.S. 37, 44 (1971).

[32] See *United States* v. *Lopez*, 514 U.S. 549 (1995); *United States* v. *Morrison*, 529 U.S. 598 (2000).

[33] See, e.g., *Alden* v. *Maine*, 527 U.S. 706 (1999); *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62 (2000).

[34] See Board of Trustees of *University of Alabama* v. *Garrett*, 121 S.Ct. 955, 969 (2000) (Breyer, J., dissenting, joined by Justices Stevens, Souter, and Ginsburg).

tors and defense attorneys, those who have worked full time as legal services lawyers and those who have worked in large commercial firms, lawyers involved in the public sector, those who work for all aspects of government, and for non-profits.

No single formulation captures the many attributes that are needed to be a good judge. But the Senate can approach the issue by looking for objective indices of nominees' views. For example, one can learn whether a person, as a part of a professional career, has contributed time and energy to represent those unable to afford lawyers. One can learn whether nominees are aware of the many recent studies demonstrating that courts are not yet places seen as providing equal treatment, regardless of race, language, ethnicity and gender[35] More than sixty court-commissioned reports address the subject matter of gender, race, and ethnic bias in the courts and the legal profession.[36] Bar associations have taken on these issues as well. One can learn whether nominees contributed to such projects.

36. See, e.g., New York State Judicial Commission on Minorities, Report of the New York State Judicial Commission on Minorities (1991); New York Task Force on Women in the Courts, Report of the New York Task Force on Women in the Courts, reprinted in 15 FORDHAM URB. L. J. 11 (1986); Ninth Circuit Gender Bias Task Force, The Effects of Gender in the Federal Courts: The Final Reports of the Ninth Circuit Gender Bias Task Force, reprinted in 67 So. CAL. L. REv. 727 (1994).

Through a variety of means, the Senate can learn whether nominees evidence concern for the human beings whose lives are to be affected by court rulings and whether they can be sensitive to the fact that disputants are often needy. One can look for evidence of a patient willingness to be tethered to records, to be grounded in the minutiae that make up legal proceedings, and to be constrained by the role to delve into the parties' claims to ascertain the merits. One can look at whether a nominee sees the use of federal courts as an important aspect of justice in the United States and supports ready access to the federal courts.

In sum, at this point in our history, I do not believe that the question is really whether the Senate can ask questions and engage in a full inquiry. Nor do I believe that the Senate has any basis in law or practice to feel itself beholden to the President and obliged to confirm his nominees.

Rather, the real question is whether the Senate will have the willingness to devote itself to the work at the level required to do so, well. Stamina, commitment, and energy are required. Hence, I come today not only to offer historical and scholarly materials, drawn from both the archives of the federal judiciary and contemporary databases, but also as a citizen, appreciative that this Committee has convened this hearing—and to ask for more. I have spent much of my life as a lawyer and law professor thinking about the role of the federal judiciary. I am deeply admiring of this institution, for, as one of our Supreme Court justices put it, "the independent judiciary . . . has been one of our proudest boasts, by reason of Article III."[37]

The task now is to make good on that constitutional promise. To do so requires a fulsome commitment by the United States Senate to ensure that the individuals entrusted with this lifetenured position, and who therefore have the power to adjudicate, to appoint other judges, and to advise this institution on the role of the federal courts, represent all of America rather than only a narrow slice of our legal, political, and social life.

Thank you.

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[35] See, e.g., AMERICAN BAR ASSOCIATION, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM (1999).

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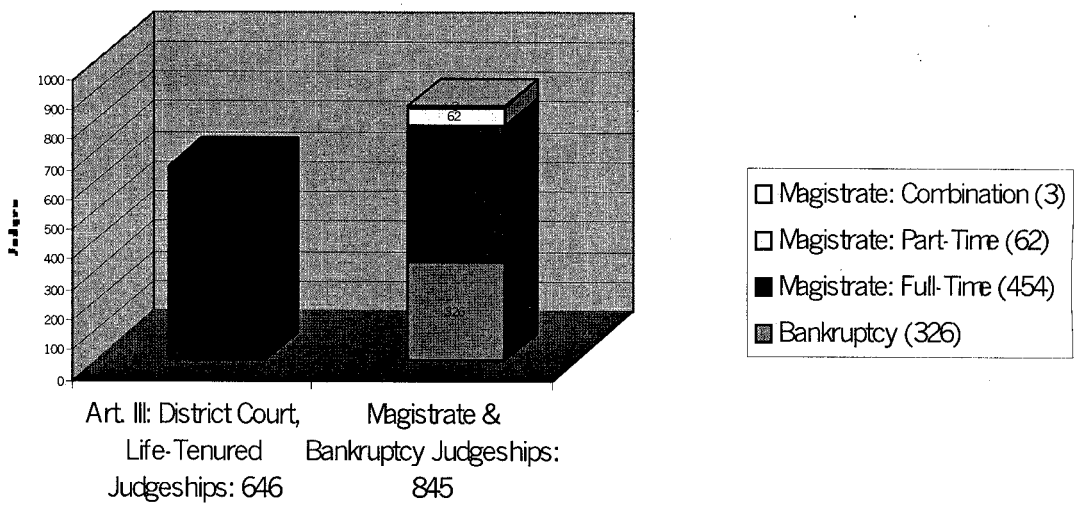
[37] See *Palmore* v. *United States*, 411 U.S. 389, 410, 412 (Douglas, J., dissenting) (objecting to the reorganization of the D.C. courts, which had been challenged by a criminal defendant arguing for an Article III judge to preside in his case).

Authorized Trial Level Federal Judgeships in Article III Courts, Nationwide: 1999



Chairman SCHUMER. Thank you, Professor Resnik, for getting a lot in in a short time.

Our next witness is Douglas Kmiec. He is the Dean of the Columbus School of Law at the Catholic University of America here in Washington, D.C., a graduate of Northwestern University and the University of Southern California Law School. In addition to postings at Pepperdine and Notre Dame Law School, Dean Kmiec served from 1985 to 1989 in the Reagan and first Bush administrations, where he headed the Office of Legal Counsel. He is the author of numerous books and articles, including *The History, Structure and Philosophy of the American Constitution*, which he coauthored with a panelist from our last hearing, Northwestern University legal historian Stephen Presser.

Your entire statement, without objection, is read into the record and you may proceed, Dean Kmiec.

STATEMENT OF DOUGLAS W. KMIEC, DEAN AND PROFESSOR OF LAW, CATHOLIC UNIVERSITY OF AMERICA, WASHINGTON, D.C.

Mr. KMIEC. Thank you, Senator, and thank you for the invitation and including my full statement in the record.

There is no question that the Senate's power of advice and consent is textually unfettered, but I think as a matter of historical context and practice, my proposition to you would be simple, that the appropriate Senate inquiry is to matters of demeanor, integrity, competence, and fidelity to the rule of law.

I think the proposition that I state here is one that is grounded in our history, going back to Alexander Hamilton's explanation in *The Federalist Papers* of what your role would be. You may remember, Senator, that his description of your role was that it would be powerful, but that it would also be generally silent in operation; that, in essence, the President would know by the fact that his men and women would have to come before you that that in itself would be quite a chastening experience, and apparently it is turning out to be so.

But Alexander Hamilton specified in particular that it was chastening with regard to the following matters. "It would be an excellent check," he wrote, "upon the spirit of favoritism in choices of the President," that it would tend greatly to prevent the appointment of unfit characters, that it would prevent the appointment of people who are laboring under prejudice or family connection or who are appointed from personal attachment or from a view of popularity.

I think if you analyze The Federalist Papers carefully, you will see that those are questions of integrity, those are questions of fitness, those are questions of temperament, those are questions of fidelity to the rule of law. So one question that I think needs to be answered is why are we reexamining this, then, today?

Now, there has been a lot of popular suggestion that maybe it is retribution for the allegation that President Clinton's nominees were not treated well. I think it has been stated here more than once this afternoon that, in fact, they were treated quite similarly to those of Reagan in terms of similar number approved, as well as the similar number that were left unapproved by virtue of the

lack of time. So I think, quite frankly, that is either a speculation that is demeaning to this body in terms of attributing to it only a partisan motive or that is factually untrue.

Another explanation for why we are here today comes from our colleague, Laurence Tribe, and he suggests that there is a need for balance. Well, the difficulty with balance is that this is an effervescent concept. It is largely undefined, and I would suggest that in addition to being largely undefined and somewhat unworkable, we already have it, whatever it is.

We have on the Supreme Court of the United States members appointed from five different Presidential perspectives. We have had recent essay writings suggesting that maybe we have too many judges on the Court and we should get people from other political experience. While there is something to be said for that argument, I think it understates the careers of the people who are already serving on the Court.

Take, for example, Ruth Bader Ginsburg, who was, as already mentioned, I think, by Senator Simon, an advocate for the American Civil Liberties Union. Take, for example, Justices Thomas, Scalia and Breyer. Thomas and Scalia had distinguished careers in the executive branch. Justice Breyer was a law teacher. So we do have a number of different backgrounds already in existence on the Court.

I think the real answer for why we are here is that there is a desire for different substantive outcomes, and that is what I heard in my colleague, Professor Resnik's remarks, and that is what I have read in some of the other statements that have been submitted to you. Quite frankly, there is disenchantment by some Members of the Congress with how the Supreme Court and the lower Federal courts are treating your enforcement powers with regard to civil rights.

There is disenchantment with regard to what the scope of the commerce power is, what things are national, what things are local. There is disagreement over other questions that have come before the Court recently with regard to the 11th Amendment and State sovereign immunity and how that interacts with Federal authority.

Quite frankly, those questions are important questions, vital questions, and I like the notion of laying things on the table. But where those should be laid on the table is in legislative debate, in responses to the Court, in responses to judicial decisions. If, in fact, the Court is saying to you that there is an insufficient legislative record to vitiate sovereign immunity, then, in fact, the response is to produce that legislative record of the type that the Court suggests is necessary, to address it head-on and not indirectly through judicial nominations.

Most importantly, it is important to keep it in that context because otherwise a very wrongful supposition is indulged. Last week, Joseph Califano, a distinguished member of this legal community in Washington, wrote an essay for the Washington Post. The essential premise of the essay was that this Congress is paralyzed, it is gridlocked, it is failing in its responsibilities legislatively.

Mr. Califano mentioned a couple of topics of concern to him. He talked about Big Tobacco, he talked about handgun control. He said basically the Senate and the House have failed on these issues, so we must turn to an alternative venue, the courts, and have policy implemented through the courts. That, I think, is the most grievous wrong that could be done to our system, not only because it substitutes the courts for your function, but it sacrifices what every school child knows is important in terms of fairness of judgment, and that is the independence of the judiciary.

The closest analog, Mr. Chairman, that I can think of is the attempt, the well-intentioned intent perhaps of Franklin Delano Roosevelt to pack the Court. You remember it. We were in a dire economic depression. The Court was not being very congenial to his ideas as to how to work his way out of that, and so he came up with an ingenious plan which he said would inject new blood onto the Court. But he rather quickly gave up that pretense and said, what I really dislike is that these conservative Justices are turning down my liberal outcomes.

Well, you remember the response to that. The response as this Judiciary Committee said was "If we may force the hand of the Court to secure our interpretation of the Constitution, then some succeeding Congress may repeat the process to secure another and different interpretation, and one which may not be so pleasant to our ears. The initial and ultimate effect of undermining the independence of the courts and violating all precedents in the history of our Government would be a dangerous precedent for the future." It was a dangerous precedent for the future 64 years ago and it is dangerous today.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Kmiec follows:]

TESTIMONY OF DOUGLAS W. KMIEC, DEAN AND ST. THOMAS MORE PROFESSOR OF LAW, THE CATHOLIC UNIVERSITY OF AMERICA, WASHINGTON D. C.

Summary: To measure nominees by an ideological litmus-test or place the burden on nominees to justify their ideological conformity is the equivalent of partisan, outcome driven court-packing. Using the advice and consent function for this purpose threatens judicial independence, wrongly assumes judicial predictability, undermines the democratic choice embodied in presidential election, and distracts the Senate from its proper inquiry into competence, integrity and demeanor, and leaves unexamined, more subtle and difficult inquiries into statutory or interpretive method and fidelity to the rule of law.

Mr. Chairman, thank you for inviting me here to testify on the appropriate inquiries for the Senate in considering judicial nominees.

My proposition is simple: the proper Senate inquiry of a judicial candidate is demeanor, integrity, legal competence and fidelity to the rule of law. It is not partisanship or policy agreement. While textually the Senate is free to inquire and to reject a nominee on any ground even a highly political, constitutionally problematic one like the nominee's views on outcomes in specific cases—it should not do so. Undertaking to make nominees carry a type of political burden of proof will over time merely invite a subservience of mind and personality that is contrary to an independent judiciary.

The significance of an independent judiciary is well-known to every school child. The point was made plain in the bill of indictment included against the English King in our Declaration of Independence. "He has made Judges dependent upon his Will alone, for the tenure of their offices," our founders complained. Any attempt to transform the Senate's advice and consent role into a similar partisan inquiry would cut deeply against our history and unnecessarily invite making federal judges dependent upon constitutionally inappropriate considerations. In the constitutional convention of 1787, great concern was expressed against having judicial appoint-

ments influenced by the Legislature out of "cabal, from personal regard, or some other consideration than a title derived from the proper qualifications."[1] Indeed, in this past century, there has been only one other such blatant effort to subvert the independence of the federal judiciary: FDR's court-packing plan.

The court-packing plan, in essence, proposed that when a federal judge who had served at least ten years waited more than six months after his seventieth birthday to retire or resign, the President would add a new judge to the bench, with up to six additional slated for the Supreme Court. FDR talked about the need for "new blood" and so forth, but everyone knew that the President wanted to change the jurisprudential direction of the Court—to bend it to his will. FDR, himself, gave up the pretense soon enough. As one scholar noted, "the President virtually abandoned this line of argument and came out with his main reason: that the Court was dominated by a set of conservative justices who were making it impossible for liberal government to function."[2] Sound familiar? These were times of great economic distress. Millions were out of work and the Court was showing little deference for FDR's regulatory initiatives to address the problem. Yet, even under these dire circumstances—which are hardly equivalent to the relative prosperity of today—"it quickly became apparent that opponents of the plan enjoyed widespread support."[3]

Like President Roosevelt, some in the Senate today may believe the Rehnquist Court, and even the lower federal courts (even though they have recently been augmented with 377 new judges sharing the judicial philosophy of former President Clinton) to be ideologically contrary to desired policy. Like FDR, these members of the Senate ask for a judicial population that will not weigh case or controversy by adherence to precedent. or textual or structural interpretation, but by the desirability of particular outcome. This course is ill-advised and should not be pursued. The short-term political gratification of defeating one or a handful of judicial nominees on partisan or ideological grounds will harm the federal judiciary and bring dishonor to this deliberative body.

Why dishonor? Consider the words of the Senate Judiciary Committee in turning away FDR's attempt to inject partisanship into the composition of the courts. The plan was denounced for applying "force to the judiciary. It is an attempt to impose upon the courts a course of action, a line of decision which, without that force, without that imposition, the judiciary might not adopt."[4] This assault upon judicial independence came with the following warning which unfortunately seems equally apt to the arguments being presently made to force judicial nominees to prove their ideological bona fides:

> "Let us, for the purpose of the argument, grant that the Court has been wrong, wrong not only in that it has rendered mistaken opinions but wrong in the far more serious sense that it has substituted its will for the Congressional will in the matter of legislation. May we nevertheless safely punish the Court?. . . .If we yield to temptation now to lay the lash upon the Court, we are only teaching others how to apply it to ourselves and to the people when the occasion seems to warrant. Manifestly, if we may force the hand of the Court to secure our interpretation of the Constitution, then some succeeding Congress may repeat the process to secure another and a different interpretation and one which may not sound so pleasant in our ears as that for which we now contend.[5]

In the end, the Senate Judiciary Committee in the 1930s strongly denounced the courtpacking exercise as having the "initial and ultimate effect [of undermining] the independence of the courts," and [violating] "all precedents in the history of our Government and would in itself be a dangerous precedent for the future."[6]

The future is apparently now, and sixty-four years later packing the courts on the basis of desired outcomes looks no better and is no more consistent with the spirit of the Constitution and its guarantee of judicial independence.

But more than judicial independence is at stake, because an attempt to exclude men and women of excellent credential and judgment because they don't happen to subscribe to your particular conception of federalism, or because they do not possess the right disposition toward this or that doctrinal formulation of due process, or affirmative action, or any other topical subject is a use of the vital Senatorial role of advice and consent that is either wholly random since it seeks to predict the unpredictable or deeply anti-democratic as it seeks to undo a national election and the

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[1] Records of the Federal Convention of 1787 (July 21, 1787).
[2] William E. Leuchtenburg, Franklin D. Roosevelt's Supreme Court 'Packing' Plan," 86.
[3] Id. at 83.
[4] S. Rep. No. 75–711 at 7–8 (1937).
[5] Id. at 10.
[6] Id. at 3.

contemplated sovereignty of the people in the selection of judges through the election of a new executive.

Nominee selection—as a matter of fact—is seldom sufficient to predict accurately the philosophical direction of a particular judicial candidate, once appointed to a lifetime job with no salary diminution. Eisenhower had his Earl Warren; Nixon had his Blackmun; Bush had his Souter. In each case, it is either popularly speculated or actually articulated that the nominee's service was at some considerable variance to the philosophy of the nominating president. A recent study for the LBJ Journal of Public Affairs estimates that one Justice in four disappointed his appointing president.

Whether or not presidents have been dismayed by their nominees at times, judicial behavior is certainly a hazard to predict. "Chief Justice Earl Warren, prior to his appointment, supported President Roosevelt's decision to intern United States citizens of Japanese ancestry during World War II . . . . But as Chief Justice, Warren became an icon of civil liberties organizations . . . ."[7] Consider also just the past term of the high court. So-called conservative Justices Scalia and Thomas insisted that law enforcement observe the privacy of a home from the intrusion of a rare thermal imaging device, while claimed liberal Justice Stevens dissented. Meanwhile, Justice Breyer assumed by the President who nominated him, the media, and this body to have a progressive or liberal ideology at the time of his confirmation, has joined results permitting a student Bible club to use a public school classroom in the after school hours, and earlier, that would more easily exclude adult cable programming. As Professor Richard Garnett has observed: "[the] justices are neither easy to pigeonhole nor easy to predict. Their dispositions are not merely 'restrained' or 'activist.' Their decisions aren't predetermined by the ideological labels slapped on?by partisan animators.[8]

But even if there was a greater level of predictability, what possibly authorizes the Senate to substitute its judgment for that of the electorate under the disguise of inquiring into judicial fitness? Despite the disagreements that you or I may have with individual decisions of the present Supreme Court or the lower federal courts, there is little to suggest that, in the aggregate, these institutions are composed of individuals unrepresentative of the people. Quite the contrary. Five presidents have contributed to the make-up of the present Court and Presidents Reagan and Clinton had the opportunity to appoint virtually identical numbers of lower federal court judges over their respective terms [377 for Clinton and 382 for Reagan]. And despite the fact that the last national election may have hung by a chad, or that some academics would have preferred greater reliance upon political (rather than adjudicative) means of resolving the electoral disputes that emerged, the outcome—supported at its most basic level by seven justices (labeled conservative and liberal alike)—has vested the power to nominate judicial officers in President Bush by a majority of electoral vote. And that vote has meaning for executive and judicial appointment that ought not be undone covertly by this body.

Here it is good to recur to first principle. As the very able Northwestern legal historian Professor Stephen Presser pointed out before this body earlier this year, the critics of the Constitution were particularly worried about any policy making tendencies of federal judges, especially as it might displace state authority. Hamilton responded to this criticism by emphasizing that it was not the job of judges to make law, that their role under the Constitution was simply to enforce the Constitution and laws as they were written, according to their original understanding. By doing so, Hamilton explained, federal judges would be acting as agents of the sovereign people themselves, and would do their part in implementing the rule of law. It was true that judges might sometimes be called upon to declare statutes invalid because of the dictates of the Constitution, but this was the role envisioned in those specific, and one might hope, rare cases. The Constitution itself sets limits on what Congress may do, Hamilton explained, and when the legislature exceeds those limits it ceases to act pursuant to the will of the people. It is then the job of the people's other agents, the Courts, to reign in the legislatures.[9] All this is a long way of saying, as Hamilton did succinctly, that in properly deciding matters of unconstitutionality, the courts are not implementing their own preferences, but that of the people.

Professor Presser further bolstered this historical reference by mention of the separation of powers. It was well understood to our framers, pursuant to the theories of Montesquieu, that liberty could not be preserved unless judges were barred from legislating. Lawmaking was left to the legislature and the people themselves. As

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[7] Bruce Fein, "A Circumscribed Senate Confirmation Role, "102 Harv. L. Rev. 672, 682 (1989).
[8] Richard Garnett, "Disrobed! Actually, They Think for Themselves," Washington Post (June 29, 2001).
[9] Federalist 78

Hamilton wrote in Federalist 78, quoting Montesquieu's Spirit of Laws directly, "there is no liberty if the power of judging be not separated from the legislative and executive powers." [10] And that is not just an admonition to judges to observe the boundaries of their intended role. Liberty can also be lost if judging is given over to the executive or legislative branches as well, or if prospective judges are invited to be lawmakers by the pressures of politicized confirmation.

Sadly, this is forgotten far too often today. Courts are casually discussed as merely alternative policymakers. Mr. Joseph Califano Jr. in an essay just last week, for example, accused and the Congress as a whole of "political pandering," "gridlock," and "failure," and as a result argued that federal courts must become (and have become) "powerful architects of public policy." [11] I doubt very much whether the Senate wants to indulge Mr. Califano's harsh premise of the failure of Congress. Perhaps, as a policy matter, many would support a more aggressive regulatory, perhaps even prohibitory, policy toward tobacco or hand-guns, and reading him, I suspect so would Mr. Califano. But the Congress has chosen a different path—to regulate tobacco advertising and to pursue background checks for certain weapon purchases. These are policy choices. Congress has made them. When the Supreme Court was asked to do more than Congress was willing to do—to authorize explicitly the FDA to regulate tobacco products—it declined. If Congress is truly displeased with that judicial outcome, it has a far more direct and appropriate constitutional means than to smuggle a highly partisan, policy litmus-test into the judicial confirmation inquiry.

The President has the power of choice in his nomination. Textually, the Senate has unfettered power to deny that choice. But text is necessarily bounded by its historical context. History reveals that the Senate up until the 1980s largely confined its inquiries to integrity, demeanor, competence and subscription to the rule of law. "There will, of course, be no exercise of choice on the part of the Senate," wrote Hamilton in Federalist 66. In observing this precept over time, the Senate was observing the designed independence of the judiciary, respecting the democratic will of the people, and abiding by the separation of powers. It certainly was not attempting to escape any allegation of its own policy forfeiture, and to seek to do indirectly that which it has lacked the political courage to do directly.

If the Senate is truly interested in improving the federal judiciary, I respectfully suggest that these hearings would be better devoted to examining judicial method and fidelity to text and legislative purpose, rather than partisanship; in other words, to inquire whether nominees coming, before you are willing to abide by the text of the statutory law as you have authored it. Legitimate questions can be asked whether there is a difference between statutory and constitutional interpretation, and how a prospective nominee would address that difference. The Constitution is to "endure for the ages," after all, and statutes often are intended to have a shorter life or a narrower object. But that said, what this body needs to know—especially from lower court nominees—is whether the judicial nominee proposes to observe the intended scope of statutory text given to it by the Congress, or one of his or her own making.

In brief, personal integrity, judicial temperament or demeanor, and learning in the law or competence are the primary indicia for eligibility of judicial service, and underlying them all, must be a sincere commitment to abide by the rule of law. Judicial independence from mean spirited or shallow political posturing or inquiry is merited because in this country, citizens are still entitled to believe that lawyers called to the bench—and those receiving the confirmation of the Senate—will allow the prospective application of previously and regularly enacted rules to prevail over arbitrary power, even when they may dislike the rule at issue. Nominees should face no obstruction or delay or improper placements of political burdens so long as they believe that all people, rich and poor alike and of whatever race, are to be equally subject to generally applicable law administered by ordinary, regular courts. Yes, the Senate has a duty to inquire whether a nominee subscribes to these age-old precepts of the rule of law, well-summarized to our founders by Blackstone, and traceable to the earliest manifestations of the common law. But this inquiry bears no resemblance to the bumper-sticker like characterizations of whether one nominee or another is conservative or liberal.

If this is so well-settled, why are we invited to reconsider it now? There is little by way of a coherent response that the proponents of a heightened nominee burden of proof give. Some proponents of a reconfigured Senate role, like my friend and constitutional law colleague Laurence Tribe, propose that the ultimate purpose of the questioning is to have a balanced court. With all due respect to Professor Tribe's

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[10] Id..

[11] Joseph A. Califano Jr., "Yes, Litmus-Test Judges," Washington Post A 23 (August 31, 2001).

erudition in matters of constitutional study, a S–4 court on the most delicate issues of the day is a fairly solid indicator of balance. Perhaps the balance "tilts" slightly to the center-right, rather than the center-left, but there is no real measure of this from term to term. So too, it is recently popular to claim that there aren't enough varieties of experience on the bench—too many former judges, as it were. This characterization, however, slights the lifetime of achievement of the present Court. Ruth Bader Ginsburg had prior appellate judicial experience, but also, led a litigation arm of a very active national organization on gender issues. Several of the justices had executive or administrative experience (Rehnquist, Scalia and Thomas); others were teachers (Breyer and Kennedy) and still others distinguished practitioners (Stevens).

However, even if balance could be defined, another witness before you today, the distinguished Professor Sanford Levinson, says balance is the entirely wrong inquiry. Professor Levinson urges you to substantively object to the Court's Fourteenth Amendment, Commerce Clause and Eleventh Amendment jurisprudence.

Why does Professor Levinson feel comfortable substituting his view of these issues for those of the present Court, or more relevantly to today's discussion, to the views of the people as represented by the President through the appointment process? Bluntly: because, to quote him, *Bush* v. *Gore* is "a patently illegitimate decision, . . . monumentally unpersuasive; and . . . its illegitimacy taints Mr. Bush's own status as our President." We owe Professor Levinson a debt of gratitude for his candor, because I believe his remarks are the gravamen of this hearing.

This is not the place to re-argue *Bush* v. *Gore*, and I won't. However, it is clear that, unlike some academics, the overwhelming percentage of people (and seven justices of the Supreme Court) accept the proposition that equal protection when applied to ballots means at least this: if you're asked to count votes, you have to know what you're counting. When the Florida Supreme Court reflected upon the matter, five of the state justices who had previously ordered the standard-less recount affirmed that "the development of a specific, uniform standard necessary to ensure equal application and to secure the fundamental right to vote throughout the State of Florida should be left to the body we believe best equipped to study and address it, the Legislature."[12]

Respect for the lawmaking enterprise, for legislatures, especially the Congress, is a salutary by-product of the proper exercise of advice and consent. "Limiting the judicial function to interpreting the Constitution guarantees the political branches their legitimate powers, which keeps policymaking in the hands of those who are most accountable to the people. . . .The Senate's power of advice and consent is a broad one, though it is not arbitrary. A fair interpretation of the qualities required of judicial nominees by the Constitution emphasizes legal capacity, personal integrity, and a commitment to abide by the Constitution."[13] Obtaining commitments to abide by favored policy outcomes does not abide the Constitution.

The Senate is rightly desirous to perform its constitutional duty well. But undertaking partisan screening no matter how elegantly dressed in academic language is a default of that duty. As Hamilton explained, "the necessity of [your] concurrence would have a powerful, though, in general a silent operation. It would be an excellent check upon the spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from state prejudice, from family connection, from personal attachment, or from a view to popularity."[14]

The Senate should not place the burden of proving partisan compatibility upon judicial nominees.

Chairman SCHUMER. Thank you, Dean Kmiec.

Finally, our last witness, and we thank him for his patience here today, is Mark Tushnet. He is the Carmack Waterhouse Professor of Constitutional Law at the Georgetown University Law Center. He received his undergraduate degree from Harvard, a master's and law degree from Yale, and clerked on the Supreme Court for Justice Marshall before embarking on a career in academia where he has developed a reputation as one of the Nation's leading legal

[12] *Gore* v. *Harris*, 773 So. 2d 524, 526 (Fla. 2000) (per curiam); this is the opinion written disposing of the matter after it was remanded by the U.S. Supreme Court the second time in *Bush* v. *Gore*.

[13] Christopher Wolfe, "The Senate's Power to Give 'Advice and Consent' in Judicial Appointments,: 82 Marquette L. Rev. 355, 379 (1999)

[14] Federalist No. 76.

historians. He is the coauthor of, among other works, *Federal Courts in the 21st Century*, and has written extensively about the history of the Federal judiciary.

Like the other witnesses, your entire statement is read into the record and you may proceed as you wish, Professor.

STATEMENT OF MARK TUSHNET, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C.

Mr. TUSHNET. Thank you, Senator Schumer. I want to thank you and your Subcommittee for inviting me to testify on the important question we are discussing today.

I am going to begin with some general comments about whether nominees must show that they are particularly qualified for the appointment or whether, in contrast, those who oppose the nomination must show that the nominees are not qualified. My written comments turn to the relevance of political experience to appointment to the Federal courts. I won't go through those points orally, but would be happy to discuss them in the question period.

It seems to me that constitutional principle shows that nominations come to the Senate essentially in equipoise because the considerations relevant to a burden of persuasion are basically in balance. That conclusion, it seems to me, is supported by the most basic aspects of our system of separation of powers, famously described by Madison in the 51st Federal Paper as one in which ambition counters ambition; that is, the separation of powers system works best when each branch—here, the President and the Senate—take positions that each calculates independently will serve the American people best.

In the context of judicial nominations, the process of ambition countering ambition works in this way: the nominee and his or her supporters can point out that the nomination was made by a President. Now, we have heard talk about deference to the President, but the question really is what is the reason, if any, for the existence of some presumption or deference.

It is not simply the position the President occupies. Rather, deference arises, if it does, because the President presumptively has the support of the people of the United States as a whole, having been chosen by a majority of them. In response, Senators can reasonably respond that they too were chosen by the majority of the American people, taken as a whole, organized somewhat differently. Indeed, I think there are a couple of considerations that make the Senators' claims somewhat stronger, although the distribution matters a bit.

The President was chosen by a majority of the American people in a single election, capturing the people's views at a moment in time, while Senators were chosen in a series of elections that, taken together, might better capture the more enduring values of the American people. And in that connection, questions of timing may matter as well. The more remote the Presidential election is, the more powerful is the Senate's claim to represent the people as of the time of nomination.

Now, the historical record is unsurprisingly subject to varying interpretations. One historian describes the Senate's role as reactive, responding to the initiative taken by the President in selecting a

nominee. In this connection, there is a particular problem in assessing history which I would put under the heading of "divided government," a relatively recent phenomenon as a sort of permanent feature of our constitutional system.

When the Senate and the President are in the same party, it is not surprising that the Senate would engage in a relatively limited inquiry and that the criteria articulated would be relatively limited. After all, there is going to be relatively little disagreement between the nominating President and a majority of the Senate where there is this sort of unified control.

I think that Senator Schumer's concern about the under-the-table problem arises in connection with divided Government, when the President and a majority of the Senate are from different parties. It is at that point that controversy arises, and I take the effort here to be one to make sure that the nature of the controversy be brought out into the open rather than concealed by some other inquiries that might be undertaken.

This historian I quoted, Dean Raymond Solomon, describes the history as one in which politics, policy and professionalism all play a role. Policy concerns, he says, dominate when Presidents attempt to transform governmental structures or policies and perceive the Court as a necessary ally in accomplishing that agenda.

Controversy has arisen when Presidents made selections based on concerns that the Senate didn't share, whether the disagreement was over a policy course the President sought to set through the nominations or over the patronage-type politics the President pursued in selecting a nominee.

My own take on this complex history would be that, in general, opponents of nominations have never thought that the mere fact of nomination carried with it any special presumption in favor of the nomination. Nomination contests have focused on whatever seemed relevant at the time: the nominee's ideology, the nominee's performance in executive office pursuing policies with which the Senate didn't agree, whether the nomination would have particularly dramatic effects on the overall direction of the Court, the nominee's background. All of this has been fair game, and it seems to me that is precisely the way the system of ambition countering ambition should work.

I want to close with two comments. The first is the observation that has been made earlier today about the inaccuracy of predictions about the course the nominees will pursue once appointed. Here, there is a line—I may not quote it exactly -from Ecclesiastes: the race is not always to the swift, nor the battle to the strong. It was amended by either H.L. Mencken or Damon Runyon, but that is the way to bet; that is, chances are you are going to get what you expect to get.

The second point relates to the concern about an intrusive or extensive nomination process and its effects on attracting people to the positions for which they might be nominated. Here, I want to refer to a dinner conversation I had nearly 30 years ago with the first judge I worked for, George Edwards, in Detroit.

At the end of my term of service with him as a law clerk, we went out to dinner and during the course of that dinner he said something that I have never forgotten, which is, reflecting on his

career, he said we should always remember that it is a privilege to have the opportunity to serve the American people. I think that a nominee who does not regard the opportunity to serve as a real privilege is one about whom we ought to have questions.

Thank you.

[The prepared statement of Mr. Tushnet follows:]

STATEMENT OF MARK TUSHNET, CARMACK WATERHOUSE PROFESSOR OF CONSTITUTIONAL LAW, GEORGETOWN UNIVERSITY LAW CENTER

I want to thank Senator Schumer and the subcommittee for inviting me to testify on the important question of the criteria Senators should use in determining whether to vote in favor of a proposed appointment to the federal courts, and especially the Supreme Court. My observations are informed by historical experience and, I believe, constitutional principle. I begin with some general comments about whether nominees must show that they are particularly qualified for the appointment or whether, in contrast, those who oppose the nomination must show that the nominees are not qualified.

My comments then turn to the relevance of political experience to appointment to the federal courts, and especially the Supreme Court. In my brief comments I will provide some snapshots from history, which indicate that many Supreme Court justices, including some of the most celebrated, have had substantial experience at the national political level.[1] After giving these snapshots, I will explain why I think that such experience is an important asset that a person can bring to the Supreme Court. I do not argue, of course, that only people with such experience should be appointed to the Court, but rather that the Court serves us best when it contains a mixture of people with different backgrounds, and among those backgrounds should be some with substantial national political experience.

I believe that constitutional principle shows that nominations come to the Senate essentially in equipoise, because the considerations relevant to a burden of persuasion are basically in balance. This conclusion seems to me supported by the most basic aspects of our system of separation of powers, famously described by James Madison in The Federalist 51 as one in which ambition counters ambition. That is, the separation of powers system works best when each branch—here, the President and the Senate—take positions that each calculates independently would serve the American people best.

In the context of judicial nominations, the process of ambition countering ambition works in this way: The nominee and his or her supporters can point out that the nomination was made by a President who presumptively has the support of the people of the United States as a whole, having been chosen by a majority of them. Senators can reasonably respond that they too were chosen by a majority of the American people taken as a whole. Indeed, they can note that the President was chosen by a majority of the American people in a single election, capturing the people's views at a moment in time, while Senators were chosen in a series of elections that, taken together, might better capture the more enduring values of the American people. In that connection, questions of timing may matter as well: The more remote the presidential election is, the more powerful is the Senate's claim to represent the people as of the time of the nomination.

The historical record is, unsurprisingly, subject to varying interpretations. One historian describes the Senate's role as "reactive," responding to the initiative taken by the President in selecting a nominee.[2] Presidents always have political allies in the Senate, who almost always take the position that the nominee is fully qualified for the position and that, in any event, the President's judgment that the nominee is qualified deserves some deference. Evidence taken from statements by supporters of a nomination is therefore, in my judgment, less valuable than evidence taken from statements by a nomination's opponents. In addition, the confirmation of a nominee has often been something of a foregone conclusion, which makes statements of principle on the question of confirmation something of a free shot by supporters and opponents: The supporters can structure their comments to lay the groundwork for using the confirmation as a precedent, and the opponents can dismiss those statements because they have no effect on the confirmation process.

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[1] My comments draw in part on Mark Tushnet, Constitutional Interpretation, Character, and Experience, 72 B. U. L. REV. 747 (1992).

[2] Rayman L. Solomon, "Nominees, Controversial," in THE OXFORD COMPANION TO THE SUPREME COURT 595–96 (Kermit L. Hall ed. 1992).

These considerations lead me to conclude that the most historically informed inquiry would examine highly contested nominations, a much smaller number, of course, than all nominations. Dean Solomon describes the history as one in which "politics, policy, and professionalism" all play a role. He points out that "policy concerns dominate when presidents attempt to transform governmental structures or policies and perceive the Court as a necessary ally in accomplishing that agenda." Controversy has arisen when Presidents made selections based on concerns that the Senate did not share, whether the disagreement was over the policy course the President sought to set through the nominations or over the patronage-type politics the President pursued in selecting a nominee.[3]

I would summarize a complex history by saying that, in general, opponents have never thought that the mere fact of nomination carried with it any special presumption in favor of the nomination. Nomination contests have focused on whatever seemed relevant at the time. The nominee's ideology, the nominee's performance in executive office pursuing policies with which the Senate did not agree, whether the nomination would have particularly dramatic effects on the overall direction of the court, the nominee's background, whether the President is using the nomination essentially as a patronage appointment or to appeal to some particular interest group—all this has been fair game. In my view, that is precisely the way the system of ambition countering ambition should work.

I turn now to the question of political experience as a qualification for judicial office. Consider first the membership of the Supreme Court when it decided *Brown* v. *Board of Education*. The Chief Justice had been Governor of California, the Republican Party's candidate for the vice-presidency in 1948, and a realistic contender for the presidential nomination in 1952 until Dwight Eisenhower entered the race. Hugo Black had been a Senator and a leader in promoting some of Franklin Roosevelt's most important legislative initiatives. William O. Douglas had been a presidential adviser and chair of one of the New Deal's major administrative agencies, the Securities and Exchange Commission. Stanley Reed had been a state legislator, general counsel to an important Depression-era agency, and Solicitor General. Felix Frankfurter had been a close presidential adviser and a major public commentator on the Supreme Court and the Constitution. Robert Jackson had been Solicitor General and Attorney General. Tom Clark had been a close presidential adviser and Attorney General under Harry S Truman. Even the least distinguished members of the *Brown* Court had significant national political experience: Harold Burton had been mayor of Cleveland and a Senator, and Sherman Minton had been a Senator from Indiana before his 1940 election defeat, after which he was appointed to the federal court of appeals.

The substantial political experience represented on the *Brown* Court was not unique, or a response to the Court's obstructionism during the early New Deal, as a second snapshot reveals. The Court in the 1920s also had several members with substantial national political experience. The Chief Justice, William Howard Taft, had of course been president of the United States. James McReynolds had been Attorney General. Louis Brandeis had been a major public figure, leading the nation's consumer movement. Joseph McKenna had been a member of the House of Representatives and, briefly, Attorney General. And George Sutherland had been a leading figure in the United States Senate, after having served in the state legislature and the House of Representatives.

A third snapshot includes the men who have served as Chief Justice. John Jay, of course, had been an important diplomat for the new nation and an author of a handful of The Federalist Papers. John Marshall had been a Virginia legislator, an important legal and political adviser to George Washington, a member of the House of Representatives, and, briefly, secretary of state. Roger Taney had been, again, a close adviser to President Andrew Jackson, secretary of the treasury and Attorney General. Salmon Chase was a governor and Senator, and Lincoln's secretary of the treasury, and, even while serving on the Court, a persistent potential candidate for the presidency. Edward Douglass White served in the Senate for three years before his appointment as Chief Justice. I have already mentioned William Howard Taft. Taft's successor Charles Evans Hughes had been Governor of New York for two terms before his appointment to the Court, and was the unsuccessful Republican candidate for the presidency in 1916. Before his reappointment as Chief Justice, Hughes served as secretary of state. Fred Vinson was a member of the House of Representatives, and, after resigning as a federal judge, occupied a number of im-

[3] For example, the Senate rejected the nomination of Ebenezer Hoar to the Supreme Court in 1879 because the President represented one segment of the Republican Party, to which Hoar adhered as well, while the majority of the Senate formed a different faction in the same party and sought a nominee from that faction.

portant positions in Roosevelt's wartime administration before becoming secretary of the treasury in 1945.

My final snapshot is drawn from a list of justices provided in the first pages of the constitutional law casebook of which I am a co-author. The list is designed, we say, "to offer at least some sense of the background, personality, and intellectual style of the justices who have had the greatest impact on modern constitutional law."[4] Omitting the Court's present members, we describe 29 justices, of whom seventeen, in my judgment, had substantial political experience, almost all of them on the national level.

I should note at this point an important qualification. Of course determining whether someone has had substantial political experience on the national level is a matter of judgment, and I have no doubt that some of my judgments could be challenged. In my efforts to count and evaluate, for example, I treat Louis Brandeis and Thurgood Marshall as people with substantial national political experience even though neither had occupied elective office before they became justices, and Brandeis had not held even an appointive national office. But I did not include Lewis Powell in my list of justices with substantial national political experience, despite the important positions he held in Virginia's education system during the early years of desegregation and despite the fact that he had been president of the American Bar Association. I counted serving, even briefly, as Attorney General as having national political experience, but what of Justice Byron White's service as Deputy Attorney General?

The snapshots I have given indicate rather clearly, I think, that over the course of U.S. history, substantial experience in national politics has been regarded as an asset for Supreme Court justices. This is not to say that such experience has been a prerequisite for appointment, or that justices with such experience have uniformly been better, according to any relevant criteria, than justices without it. Rather, it is to say only that the judgment of presidents and Senators appears to be that having a Court with some justices with national political experience is valuable for the Court and the nation.

What might explain that judgment? I will identify three reasons, in decreasing order of importance, for thinking that the Supreme Court's quality, and therefore the quality of constitutional law, is improved when some justices have had significant national political experience. Again, of course, one's view about the quality of constitutional adjudication depends at least in part on the general understanding one has about what constitutional adjudication is, and each Senator will have to assess what I have to say in light of his or her individual understanding about that question.

The most important reason for thinking that substantial national political experience is a valuable attribute of Supreme Court justices is that an important component of what we want from Supreme Court justices is what Dean Anthony Kronman of Yale Law School calls prudence or practical wisdom, precisely because justices are called upon not to articulate principles of justice in the abstract but rather to develop principles of justice suitable for regulating government in the present day, under real-world conditions.

We can find practical wisdom in many places, of course, but people with substantial national political experience have two characteristics that make them particularly suitable candidates for finding it. First, they have displayed their capacity to exercise practical wisdom in their public lives. So, we simply have a larger evidentiary base for evaluating a nominee's capacity to exercise practical wisdom when the nominee has been an important public figure. No doubt backroom advisers and lawyers in private practice can have practical wisdom, but only those whom they advise will be able to say with confidence that the nominees are indeed people of sound practical judgment.

Second, an important reason that people become successful public figures over the long run is that they actually demonstrate their good judgment. Among other things, success requires that political figures listen well to people with views different from theirs, and learn how to respect and to some degree accommodate those views without yielding on what is fundamental to the political actor. Here substantial national political experience does not itself give the person a particular asset, such as knowledge about the realities of government that he or she can contribute to the Court. Rather, successful performance on the national political stage is an indication that the nominee has the valuable character trait of practical wisdom and judgment that we seek in judges.

A somewhat less important reason for thinking that national political experience should be regarded as an asset in a judicial nominee is the sense of reality that peo-

[4] GEOFFREY STONE ET AL., CONSTITUTIONAL LAW lxxi (4th ed. 2001).

ple with such experience can bring to constitutional adjudication. To the extent that Supreme Court justices are developing doctrine aimed at ensuring that the American people are governed as well as we can be within constitutional limits, knowing how government actually works may be a valuable asset. The usual example given to support this point is that someone sensitive to the realities of the national legislative process would not dismiss legislative history as a guide to interpreting statutes.[5] Another example might be that of Justice Byron White, the Court's most articulate defender of the proposition that separation-of-powers questions should be resolved with an appreciation of the way in which members of Congress and members of the executive branch are engaged in long-term interactions. Justice White based this understanding of the Constitution on his experience as Deputy Attorney General.

I think it is indeed important that the Supreme Court as an institution have access to this sense of the realities of governing. One problem, however, is that those realities change, and a person appointed in one era might not understand the new realities. Justice Black, for example, clearly knew what Congress was like in the late 1930s, but he served through the 1960s, by which time the realities of the legislative process had changed dramatically. He could, and did, contribute his sense of the realities of governance to the Court in the 1940s, but his ability to make such a contribution dissipated over time. This consideration suggests to me that Senators should be concerned that they be presented with some regularity with nominees with substantial national political experience. A long run of nominees without such experience is, I think, likely to impair the quality of constitutional law.

Finally, in conversations about the contributions people with substantial political experience can make to constitutional adjudication, sometimes I have heard politicians disparaged as people who are good at the art of compromise but—for that reason—not well suited for developing constitutional principles. Designing a statute that accommodates competing interests, it is thought, is quite different from articulating a constitutional principle to regulate some general area like free speech. In the main, I agree with this position, although I think it fails to appreciate the extent to which politicians themselves act on principle. Still, I think it worth noting that the art of compromise is not foreign to the Supreme Court. As with statutes, opinions contain language whose terms are sometimes negotiated among the justices, as the inspection of the papers of various justices at the Library of Congress reveals. A person adept of explaining to a recalcitrant colleague why a change in language is desirable and need not impair what the colleague thinks important serves a valuable function on the Court. To the extent that people with substantial political experience bring such talents to the job, all the better. But, of course, those talents are not unique to people with such experience, so the ability to work out compromises over doctrinal formulations is the least important asset people with substantial national political experience bring to the Court.

I should be clear that neither my snapshots nor my normative argument establish that we should have only people with substantial national political experience on the courts. For example, having some grasp of the realities of government is useful, but so is having some grasp of the realities of business, and having some grasp of the realities of the criminal justice system, and so on. Different nominees bring different experiences to the courts, and what seems desirable is having a decent mix of people, among whom are some with substantial political experience.[6]

To summarize: Historically it has been thought important that some significant number of Supreme Court justices have substantial experience in national politics. And there are good reasons, based on what I think is the best understanding of what we seek in constitutional adjudication, supporting that judgment. In particular, judges with such experience are likely to bring a sense of reality to constitutional adjudication, and, more important, practical wisdom as well.

Chairman SCHUMER. Thank you, Professor. I want to thank all five witnesses. The testimony was varied, but I think right to the point, and we appreciate it very much.

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[5] I note, though, that to some extent those who argue against resort to legislative history have an account of statutory meaning based on a theory of democratic self-governance according to which the actual operation of the present legislative process is irrelevant.

[6] I think it worth noting as well one disadvantage associated with the nomination of people with substantial national political experience: The Senators who will consider them in the confirmation process are likely to have had personal relations with the nominees. Such relations can enhance the quality of the Senators' judgments, but they also can distort those judgments: nominee who has been easy to get along with may mistakenly be seen as wise and prudent.

We may have a vote at five o'clock, so I am going to do 5-minute rounds and maybe we will go for a second round, if that is OK.

I want to propose three questions that as a Senator I would like to ask nominees, certainly to the Supreme Court, but others, and their answers would not be totally dispositive, but influential, let's say, or having some influence in whether I would vote for them.

They are: what is your belief in the First Amendment, how does it affect your views on whether the Congress should be able to regulate campaign finance reform? What are your views on the Second Amendment and do you believe that licensing and registration of firearms is inconsonant with the Second Amendment? What is your view on the Federal right to privacy and how does it affect your views on a woman's right to choose?

I could go on ad nauseam with questions like that, and I would be particularly interested in Professor Rotunda's and Dean Kmiec's view on that, but I would want to hear all the witnesses because particularly Professor Rotunda's testimony would seem to say those questions should not be asked and that should not be influential in determining whether we should have a judge. Now, these are not political questions, these are not questions involving a particular case. They are questions of broad judicial philosophy that have relevance to the American people.

So why don't you start, Professor Rotunda, because I have a feeling you would think that those are not legitimate questions for inquiry by this committee, give your reasons why, and then I will ask others who would disagree to rebut that.

Mr. ROTUNDA. I don't think those questions should be answered. Judge Ruth Ginsburg came to Illinois some years ago when she was on the D.C. Circuit and recalled questions that were going to be asked of her by a group called United Families of America. They wanted to test the nominee's "balance." That is her phrase. These were typical inquiries: can Congress limit the jurisdiction of the Federal courts in, say, school busing cases? Do parents have any rights with respect to abortions performed on their minor children? Present law and practice of the armed forces bar women from combat. Could that exemption withstand a constitutional challenge?

She said that United Families wanted these inquiries to uncover any bias toward activist and she said, "I was relieved when Senator Howard Metzenbaum, who chaired the confirmation hearing the day I appeared, refused to ask the questions. I found them a frightful prospect."

I mean, it is a free country: You ask what you want, but I don't think a nominee should answer those questions. It is basically giving a promise on how he or she is going to vote on a particular case and you wouldn't want a nominee like that.

Chairman SCHUMER. Well, those are not particular cases, but much broader judicial philosophy. I didn't ask specifically about any specific case.

Mr. ROTUNDA. Well, you asked does the First Amendment limit the campaign financing rules.

Chairman SCHUMER. Right.

Mr. ROTUNDA. Does the Second Amendment restrict Congress' power to restrict arms? You are asking about legal issues. I don't think judicial candidates should do that.

Chairman SCHUMER. Any disagreement?

Mr. TUSHNET. Well, it seems to me on the Second Amendment question, I think most of your nominees or people put up in front of you would say, I know there is this controversy over how the Second Amendment should be interpreted; I really haven't examined it in any detail and so I don't have any formed views on that. I think that would be an honest answer for many of the nominees. I think it is an appropriate question to ask and I think that is certainly an appropriate kind of answer.

On the campaign finance question, I think it would be perfectly proper for somebody to say, well, you know, Buckley v. Valeo is on the books. There is now 25 years of campaign finance law. The Supreme Court has decided. They have identified a series of considerations about the appearance of corruption and whether that is implicated by particular forms of campaign finance regulation.

Now, you could go either way. One nominee might say, it seems to me that they have struck the balance somewhat in a way that makes me a little uncomfortable. They have identified the right kinds of things, but I am not sure which way I would go on particular cases. Or they might say they have identified the right kinds of things and, on the whole, the law that the Court has developed seems basically OK by me.

Now, that seems to me revealing of what we have been calling here judicial ideology, a way of thinking about—

Chairman SCHUMER. I am sort of at a loss as to what Professor Rotunda would have me—why we would have a hearing here. Now, someone pointed out on the other side that we didn't have hearings for a while.

Mr. ROTUNDA. When you had them, they were closed to the public and the nominees could not testify.

Chairman SCHUMER. So what is the purpose of the "consent" part of the Constitution?

Mr. ROTUNDA. Well, what we have been doing for the last 200 years, which is—

Chairman SCHUMER. Well, no. These questions have been asked before.

Mr. ROTUNDA.—talking about integrity.

Chairman SCHUMER. Just integrity? OK.

Mr. ROTUNDA. That is right. Take the Second Amendment question. If you can ask that question, the Senator is going to be saying, OK, you haven't thought about it; think about it for a month and come back to me because I would like to know your answer on that. And we shouldn't do that.

Chairman SCHUMER. Why don't we have Professor Resnik and Professor Levinson?

Ms. RESNIK. Imagine that you asked the question, does the 14th Amendment prohibit discrimination against race and are single-race schools illegal? No one would object to your asking that question.

Chairman SCHUMER. Would you, Professor Rotunda?

Mr. ROTUNDA. No. That is what the law is.

Ms. RESNIK. But my point is—

Chairman SCHUMER. Because it is settled law? Is that the reason?

Mr. ROTUNDA. Yes.

Ms. RESNIK. But actually what the real meaning of *Brown* has not yet become settled law.

Chairman SCHUMER. Well, what if I believe *Roe* v. *Wade* is settled law?

Mr. ROTUNDA. Well, the Supreme Court has pretty much settled it for the last 25 years.

Chairman SCHUMER. So my third question is a legitimate question?

Mr. ROTUNDA. Well, no. I think if you ask somebody what has the Court ruled on this, that is just like looking at a law book; you answer the question. If you are asking somebody how they are going to rule on the issue, I think a lower court judge should follow the U.S. Supreme Court. That is what a judge should say. Is that helpful to you?

Chairman SCHUMER. It is certainly helpful in knowing someone's judicial philosophy to me. It is not dispositive, but it is helpful. To me, it is as important as the law school they went to or the fact that they haven't had anyone file anything against them at the bar association. Particularly for a Supreme Court nominee, you bet it is helpful. I think that is part of my job. I think I would be derelict in my responsibilities if I didn't ask those questions.

Go ahead, Professor.

Ms. RESNIK. I would like to also push you a little further. In addition to asking and looking at their answer, you should go further and look at what they have done in their past.

Chairman SCHUMER. Of course.

Ms. RESNIK. We need to not just look at the answer in a given time. The role of the Senate confirmation hearings is a positive one in developing the legal rules. The good news is since 1925 we have been doing it, and the better news is that more recently, we have been doing it in public. Doing it in public creates a public forum for debating what our law ought to be. When you confirm someone, you are endorsing the notion that this person ought to have the privilege of serving as a life-tenured judge.

Chairman SCHUMER. I will let Professor Levinson answer, but I am sort of befuddled that we are allowed to ask questions about settled law, but not about unsettled law. Well, I would like to know the big book in the sky that says what is settled and what isn't settled. On so many of the issues, the side that agrees with them regards it as settled and the side that disagrees regards it as unsettled. I am sure there are some crazy people in this country who don't think the 14th Amendment, as Professor Resnik brought out, is settled. It is a weird path to go down.

Professor Levinson?

Mr. LEVINSON. I think the thrust of Professor Rotunda's argument is that the Senate should go back to its pre-1925 practices, and I think there are very good reasons that the Senate has over the years rejected those. In my earlier comment, I mentioned that the Framers did not imagine political parties. I think it is also fair to say that nobody imagined the practical power of the Federal judiciary.

Whatever side you are on, I suspect that all of us have, at least in conversation, referred to the imperial judiciary, even if we have

been referring to different judges and different judiciaries. As a practical matter, everybody knows it matters who is on the courts. You are interested and the public is interested.

If you don't stop holding hearings at all with the judges, the second best model for Professor Rotunda is the Scalia hearings. But Justice Scalia quite remarkably—and I will kind of give him credit for his gumption on this—refused to answer a question, I believe, about *Marbury* v. *Madison* because, after all, the issue of judicial review and judicial power is the fundamental issue. Professor Tushnet has written an excellent book attacking the idea of contemporary judicial review, and if you take this seriously, there really is nothing to hold hearings about.

Chairman SCHUMER. You are right. It gets to a point of absurdity, I guess.

Do you want to have the last word, Dean Kmiec, because you didn't have a chance on this one?

Mr. KMIEC. Well, I doubt it will be the last word, but an observation. I think the difficulty with the questions you pose may be the level of specificity. It would be a preferred alternative to ratchet it up to the methodology that the particular nominee would use in the context of—

Chairman SCHUMER. Well, I specifically tried not to make it a specific case.

Mr. KMIEC. Not to make it a specific case. I think this is a delicate line to observe because, Mr. Chairman, part of your question is really a question about the rule of law. As you may remember, in my testimony I said it was entirely proper to ask questions about fidelity to the rule of law and questions about stare decisis and the like.

But in terms of actually evaluating a judicial nominee, I think you want to know method. You want to know is there a difference for this nominee between statutory interpretation and constitutional interpretation. How does he approach both questions? And perhaps as you edge ever closer to a particular substantive area, you run the risk of not being able to anticipate where cases are going to come from, and that is what threatens the independence of the judiciary.

Chairman SCHUMER. I would never want to press a potential nominee on a specific case. I would never say on the evening of March 2nd, such and such occurred and this is what happened and how would you rule?

In fact, I specifically avoided, I believe, in my question mentioning Buckley v. Valeo or *Roe* v. *Wade* because I didn't even want to get into that level of specificity. But to explore the very question that you have posed—how does someone reason and how does someone look at statutory rulings—you need to ask questions like this.

Mr. KMIEC. I think those questions are in the ballpark, but I think the one thing that you would have to be alert to very assiduously is the moment that the citations start to come out.

Chairman SCHUMER. From which side of the table?

Mr. KMIEC. On either side of the table, because for the nominee to awkwardly start making gratuitous, non-judicial comments

about the cases or for the questions to start being put to him starts to undermine, I think, the judicial process.

Chairman SCHUMER. Just one point here. Some of our nominees have very little judicial experience, but some have been judges at the State or lower Federal courts for 20 years. I would need less of an answer for the latter type of nominee than the former type of nominee, don't you think?

Mr. KMIEC. Well, without a doubt, Professor Resnik made that point about reviewing their past behavior, whatever it is, whether it be prior judicial opinions, whether it be law review writing, whether it be speeches that they have given to the bar association.

But, again, all of those things seem less important than whether or not the person has manifested an attachment to the seriousness of the position that he has been nominated for in terms of the rule of law, his integrity to abiding by the precedents as they exist, depending on the level of court we are talking about here now—different judges are going to have different responsibilities with regard to that—and, of course, fundamental fitness, preparation, learning in the law.

Chairman SCHUMER. They are all important, and I would say no specific is dispositive to me, at least.

Senator Sessions, I appreciate your indulging me.

Senator SESSIONS. This is most interesting, Mr. Chairman. I appreciate this fine panel. We have had a lot of good discussion about this matter and I think it is worthy of discussion. I think it is a free country and we ought to talk about it, but I don't believe that we need to alter our historic pattern of giving deference to the President.

I believe Senator Simon said he wished he had not voted for Scalia, and would not had he come again. But does that mean that I as a person who believes in restraint should vote against Ruth Bader Ginsburg and other judges that got overwhelming support in this body just because we don't agree with all aspects of their legal, judicial or personal politics? I think it is a dangerous road for us to get into, that we go down that road, and I would share that.

I think the greatest danger, as Senator Hatch has stated, is do we have a judge who is an activist? An activist is a judge that allows his or her personal political or philosophical views, whether liberal or conservative, to override their commitment to the rule of law.

I believe Professor Rotunda noted that our laws are respected around the world. Indeed, I am absolutely convinced as I become older that the strength of the American economic system, judicial system and political system is our legal system. You can expect to go to court and get a fair and consistent verdict in any court in America normally, and if not, you have a good chance of getting it reversed. It is a good legal system. It has worked by keeping politics out of it. We need to keep politics out of the courts.

Now, I know there is afoot in this country a philosophy, particularly in law schools, that believes that all law is politics, that everything is politics and there is no truth, that you can redefine words to mean anything you want them to mean, and therefore a judge has a power to carry out an agenda. That is a threat to democracy. That is a threat to democracy because judges are lifetime-

appointed; they are unaccountable to the people, they are anti-democratic. It is the only aspect of our system that I know of that is that way, and we ought not to put somebody on the bench that has an agenda to achieve. That is the key aspect.

I remember, and I will never forget it, in the early 1980's Hodding Carter when this debate was going on was on "Meet the Press" and he said we liberals are frustrated because we can't expect the courts to carry out our political agenda which we can no longer win at the ballot box. Basically, that is what he said, and I think that is what the key aspect of it is here.

We want to have judges, whether they are liberal or conservative, who have fidelity to the law and will subordinate themselves to it. Now, if you start asking them about what is your view on firearms or campaign finance reform, a judge who thinks his answer might not be in accord with one more than half this Committee is probably in a difficult position.

I would submit to you honorable people can disagree on whether Laurence Tribe is right and the right to bear arms is a personal right guaranteed under the Second Amendment or not. We ought not to just decline to confirm a nominee who may disagree with us on that point or any other single point. The judges are all over the lot. We have got people in this Senate who believe that the burning of a piece of cloth is speech and ought to be protected, and so does Scalia. The same group of people believe that we can pass a law in this Senate that says a group of American citizens can't come together and raise money and buy an ad on television to say Senator Jeff Sessions is a no-good skunk. They say that doesn't affect the First Amendment right of free speech and press.

I say those are serious matters and I don't know the answer to them. I don't expect every nominee who comes before us to answer those questions. Hopefully, if it ever comes before them, they will study every brief and they will study history and give it serious thought.

Mr. Chairman, I think you can't prohibit a Senator from asking a lot of the questions you are talking about. I think you do get an insight from some of those questions, but we have got to be very careful that we don't politicize this process. That would be my concern.

I will go back to you.

Chairman SCHUMER. You have got plenty more time.

Senator SESSIONS. I have questions, but I will let you go next.

Chairman SCHUMER. Great. I just wanted to follow up on what you said. The problem here is what people see and where you come from. You said Orrin Hatch said "activist judges," and I understand where people in the 1970's and 1980's and others particularly said we have a Supreme Court that is so far away from what the American people think that they are making laws that they can't get through Congress.

I would argue that now there are a lot of people who feel that the activists on the Supreme Court are certainly not Judge Ginsburg or Judge Breyer, the two Clinton appointees who tend to be regarded at least by the people on the left as moderate.

I like moderates. When I appoint judges in New York, I don't want far-left people because I have seen them in New York City

make laws that are ludicrous. I don't want them and I will tell you stories, between you and me, of people I have rejected because some of their decisions, even though my heart would agree with them, were so impractical and so beyond the bounds. They were just saying I am a judge and I want to put it my way on homeless issues, on things like that.

I would say to you that, here, lots of people regard the real activists on the Court as Scalia and Thomas. You may say, well, they are strictly interpreting the law and they are not activists. But some of us would say the Commerce Clause has been interpreted since the 1890's and the 1912s, you know, the progressive era, and certainly the New Deal, as allowing this, this, this and this. And all of a sudden we get some people who say, oh, no, let's go back to the way the Commerce Clause might have been in 1840.

I would say, or some would say—let's not even bring you and me into this—many would say that is activist and the danger is having too many of those activists.

Senator SESSIONS. Well, let's talk about that.

Chairman SCHUMER. Well, I want to get the panel's view on this.

Senator SESSIONS. All right. That would be just as well; it would be better.

Chairman SCHUMER. And then we will talk about it, but the same, exact arguments that many on the right objected to with the Warren Court are being used now by many on the left to object to the present Court. And I am not talking about *Bush* v. *Gore*. I don't quite agree with Professor Levinson on that. He is the President and that is that. I don't think it was great reasoning, but it doesn't influence my views on how I want to vote on judges.

Senator SESSIONS. He won anyway, the recounts show.

Chairman SCHUMER. Well, we won't get into that one now. I am trying to avoid it, Jeff.

Senator SESSIONS. You started it.

Chairman SCHUMER. And so particularly when you have the present President Bush who said he wanted to choose judges like Scalia and Thomas, who are not—I forget the words now, but we can read them into the record—who are not big liberals and who are not translating the law too far, many in the country, and not people just on the far left would say because the President has decided to nominate people who are such activists, activists on the right as opposed to activists on the left, there is an added burden to stop him, just using the same analogy used, but mirror-imaged.

I would like to know people's view on when a President seems to be invoking some degree of judicial philosophy in whom he chooses, does that put a greater burden on the Senate to bring out who the nominees are? Does that mean the judges should have to go forward?

This time, I will call on Professor Resnik first.

Ms. RESNIK. Well, I would just like to start by working on these words "to act." Imagine you are a judge in a particular case and you have heard all the testimony and you just say, wow, I really can't decide, I pass. We don't let judges do that; they have to judge. To judge is to act. So all judges of any stripe, including the moderates, are acting in rendering judgment.

Then the question is what is their license? The facts in a case are the first basis for their license. One of the problems with the current majority of five on the Supreme Court is that many of their decisions are what I would call "factless", which is to say that their opinions are theoretical discussions of the structures and the meaning of the Constitution, but the decisions do not actually struggle with the facts in the records, including the records made here in Congress.

So when are judges moving outside their realm? I noticed that Boyden Gray and I would say exactly the same thing. Judges should not legislate. What judges need to do is, A, hold a presumption in favor of and deference to Congressional statutes, and B, decide based on facts and arguments on whether to shift legal rules, and C, but try to make narrow rulings.

I am a judicial conservative in the sense that I think judges ought to do less rather than more. In that sense, the real concern now is that courts are striking statutes with breathtakingly general statements. For example, take the deeply atextual approach to the Eleventh Amendment. For those who care about the text of the Constitution, one of the most remarkable aspects of the current 11th Amendment jurisprudence is that some of the majority opinions state that it is not the text of that provisions that matters it is what these justices believe it supposed to mean that counts. That is where I think we move into a form of aggressive judicial behavior. All judges must act; what is objectionable is the take on aggressive expansionist authority.

If the President is saying that such an aggressive posture is his model of a desirable judge, then your work is all the greater, particularly in a split government. In a split government, found a split election, we need to be sure that the people who are the new judges really are judges for us all and not appointed to forward only a particular, narrow agenda. So I think you actually have a bigger job now than you might have under other circumstances.

Chairman SCHUMER. Professor Levinson?

Mr. LEVINSON. I agree with most of what Professor Resnik has said. I confess I don't find the word "activist" very helpful on either side, and in terms of Senator Sessions' comment about law and politics, I would return to Justice Frankfurther's comment about the idealized political pictures. Whatever my views about *Bush* v. *Gore*, I am sure that the majority believes that that is the accurate political picture of the Constitution, just as I am sure that the dissenters believe that is the actual constitutional picture.

I think the point of the Frankfurter quotation and the Justice Breyer quotation is precisely that law is complex, is controversial, is unclear, especially the higher up you go in the judicial hierarchy. I have no doubt that the comments made earlier that most district judges will come out the same way most of the time—we might quibble about the percentages, but I suspect you are right.

But I think that as you go higher in the judiciary, the cases are going to be more difficult, more controversial. And then I think to keep with the Frankfurter metaphor, the lens you use, the filter you use and the like, are thoroughly sincere. I think that all of the people we are talking about are people of integrity, but they are

using different filters. They do look at different things and you come out sometimes with profoundly different pictures.

I think that the question about inquiry into ideology is precisely—and this metaphor might come to an end—precisely what camera you are going to use, what kind of equipment you are going to use. I think it is perfectly proper to ask those questions, but I really don't think the words "activist" or "restraint" are at all helpful anymore. I think they are simply labels to attack people whose pictures you basically don't like.

Chairman SCHUMER. Professor Rotunda?

Mr. ROTUNDA. Well, Justice Scalia a few months ago wrote the opinion that banned warrantless searches using high-technology, heat-seeking devices. Justice Stevens was in the dissent. Maybe when President Bush says he wants to appoint Justices like Scalia, he means people that respect our Fourth Amendment privacy rights. Maybe that is what he means.

How in the world he is going to find these people, I don't know. I mean, you could ask somebody, do you agree with Justice Scalia's opinion? And I guess the answer would be it is the law now; lower court judges are supposed to follow it. But otherwise, I don't think Presidents, any more than Senators, are able to predict with any kind of accuracy.

Chairman SCHUMER. President Bush, when he mentioned Scalia and Thomas, mentioned the words he didn't want liberal or activist judges. I believe that is in the quote.

Mr. ROTUNDA. That is right.

Chairman SCHUMER. I think he was much clearer than you are giving him credit for.

Mr. ROTUNDA. Professor Resnik doesn't believe in activist judges. You want moderate judges, we all want moderate judges, but that is a level of generality that I don't think really helps a lot. I think that if we look to some of these—

Chairman SCHUMER. How do we find them?

Mr. ROTUNDA. What?

Chairman SCHUMER. How do we in the Senate help find them if we want them, or how does the President find them? If none of us can ask the questions that I asked in the first round, I don't get it.

Mr. ROTUNDA. Some things are impossible, like trying to square the circle. If you wanted to look at somebody's background, the Senate would have rejected Hugo Black, who was a card-carrying member of the Klan, and still had his card when he was a Senator.

Chairman SCHUMER. But the exception doesn't prove the rule.

Mr. ROTUNDA. No. I think actually that that is the rule, that we tend always to guess wrong. When we reject somebody on the bench, we never know what kind of judge he will be, but we have accepted people on the bench who have really surprised us all the time. And I think they ought to because that is why we give them lifetime tenure and salary protection. They are not beholden to the President or the Senators, and they shouldn't be.

Chairman SCHUMER. Do you have any historical perspective on this, Professor Tushnet?

Mr. TUSHNET. Well, I want to reiterate the point I made earlier that, as a general matter, you can predict reasonably well. If you

could predict as well on the stock market as you can predict about judges, you would be a very rich person.

It just seems to me, of course, there are individual exceptions and, with individual judges, particular cases where things are somewhat surprising. But I don't think President Reagan is disappointed in his appointment of Justice Scalia. I think he wanted a conservative, activist judge and got one. Now, he might not like the flag-burning decision. I have no idea about the Fourth Amendment stuff, but on the whole he got what he wanted.

Chairman SCHUMER. You can always point to exceptions here and there. Otherwise, we might as well just go Aristotlean, was it, or Plato or Socrates who said we ought to choose people by lot because none of these questions matter because we can't predict?

Ms. RESNIK. I want to disagree a little bit with Professor Levinson's notion about a focus only or primarily at the higher levels of that Judiciary. Look at the district court judgments. Some are reading even the current Supreme Court's Commerce Clause jurisprudence for more than it is worth. It is in the lower courts where the meaning of *Brown* of the permissiblility affirmative action is debated. Lower courts are parsing the meaning of the Child Support Recovery Act, of the 11th Amendment.

I want to underscore that the Senate's job shouldn't be just seen as a sort of one-shot play where you put in an appearance for the purposes of the United States Supreme Court, or even some of the high-visibility appellate court judgeships. To me, the real question is how to help the Senate have the wherewithal and stamina to do the needed inquiry for this life-tenured position time and time again. How are you going to develop and embrace that role? How can you institutionalize practices?

Chairman SCHUMER. Good question.

Ms. RESNIK. The judiciary at the beginning of the twentieth century was 70 to 100 people. We are now talking about 700 to 800 lifetime appointments. The stakes are high each and every time. To me, the question is how can any of us help you augment your resources so you do undertake the inquiry not as a show, but as a serious effort to express the degree to which we all cherish the Article III judiciary. The Senate and the President together constitute this other branch with deep respect for it. How can we help you institutionalize processes that express that approach and that make this serious inquiry go forward?

Mr. KMIEC. And ideology isn't it. Respectfully, there is a fundamental divide between two questions. One question is to the nominee: how will you go about your job, how will you go about deciding? The other question is how will you decide?

The question, how will you decide, is entirely inappropriate, I respectfully suggest to this body. The question, how will you go about deciding, is the difficult and the tough one, the one that I think Professor Resnik just alluded to. But it is also the one that Senator Sessions picked up because, in essence, it is asking the nominee, do you believe that the language this body, the Congress of the United States uses has meaning and can be ascertained with reasonable effort from the statute itself, from the statutory placement of its words, from the underlying purpose that gave rise to the statute in the first place? Will you make a faithful effort to ascertain

our meaning so that the politically accountable branch will, in fact, govern in the United States? That is the question.

Chairman SCHUMER. Professor Resnik wouldn't disagree with you. She is just saying some of the present members are ignoring that and we ought to find out if they will continue to ignore it.

Is that right? Is that a fair statement?

Ms. RESNIK. Absolutely.

Mr. KMIEC. But be careful here. The evidence of how they are ignoring it cannot be proved by that you dislike their 11th Amendment jurisprudence or you dislike their Commerce Clause jurisprudence or you dislike their holding on a particular flag case. I may dislike them, too.

The question is did they faithfully go about their business as a judge seeking to ascertain in the text of the Constitution, the structure of the Constitution, the history of the Constitution what it means to have a First Amendment right of free speech. Did they go about doing that? And if, in fact, they fairly went about doing that, then the outcome is far less important because you and I can't anticipate the cases that are going to come before them.

We can anticipate whether or not they have the legal, mental capacity and the disposition to fairly carry out their function. So, again, the difference is how you go about deciding, as opposed to how will you decide.

Chairman SCHUMER. Go ahead.

Mr. LEVINSON. Could I suggest actually one additional question, and I would be very interested to hear particularly Professor Rotunda's and Dean Kmiec's responses. I think it would be perfectly proper to ask nominees if they thought it is proper—and what they would do—to time their leave-taking from the Federal judiciary with regard to the political identity of the President or the Senate.

I think there is no doubt, for example, that Justice White and Justice Blackmun timed their resignations to wait for a Clinton presidency. There have certainly been similar suggestions with regard to the current Court, and one can look through our history—

Chairman SCHUMER. Professor, some would have us believe that never, ever happens.

Mr. LEVINSON. But that is demonstrably false, and it does seem to me that this is a very clear and important way that politics injects itself into the judicial role if, by judicial role, we mean the way one leaves that role gracefully.

This does not ask anybody to talk about a future case, to promise a decision on the merits or the like. It simply asks, in effect, whether one ought to take into account the politics of appointment. And to the degree that we do believe that the politics of appointment are taken into account in timing resignations, I think it is certainly a matter worth hearing on some other day whether there is anything that can be done about that, short of abolishing lifetime tenure.

Chairman SCHUMER. Go ahead, Professor.

Ms. RESNIK. It is the politics of authorizing judgeships, as well, because the Congress increases the number of life-tenured judgeships under certain circumstances and not under others. Just last year, under the prior administration, we were hearing from mem-

bers of the opposing party in Congress that we didn't need more life-tenured judges because the benches were full enough. Now there has been a change in administration, some of the people who had opposed additional appointments for the Fourth Circuit or the D.C. Circuit are suddenly saying that now we need more life-tenured judges. So the rhetoric around the need for appointments is deeply steeped in politicals.

Chairman SCHUMER. If you ask the average American person does politics have anything to do with the role of selecting judges, and even the way judges decide, they say of course it does. And it is not the worst thing in the world, they would say.

I understand the countervailing argument and that we can't just have someone's politics decide things. That is why we have a system of law and that is why we have judges interpret the law. But the opposite argument is like the gambling in "Casablanca." It is somewhere in between, and that is what we are trying to figure out here, I think.

Go ahead, Dean, and then Senator Sessions has been very patient with me.

Mr. KMIEC. I think we are trying to figure that out. I would disagree a little bit with what you report to be the conversation from the man on the street. I think he would readily admit, thinking through the nature of the appointment process and where the Constitution assigns the appointment responsibility to the President of the United States—Alexander Hamilton says the Senate will have no choice in the selection of nominees. They can, of course, reject the nominees given to them, but they have no choice in the selection. You know this, as well. Justice Scalia, from the bench, in the patronage cases articulates how odd it is for the Court to put patronage off limits in those cases when, in fact, the Justices themselves emerged out of a political process.

But we do understand from the guarantee of independence of life tenure and no salary diminution that, in fact, these judges and Justices will dispassionately, as much as that is humanly possible, aspire to the rule of law. And the rule of law is still what Blackstone and Dicey and all the other great authors told us it was. It is to be governed by the written word, not arbitrary exercises of power. It is to extend equality of treatment to rich and poor alike, and to people of all races alike, and not to selectively apply the generally prospective law. That is what we want out of our judges.

I think, therefore, Mr. Chairman, they would disagree with you on the second point. They would not expect a true judge who was trying to do his job to make a political decision in terms of the writing of an opinion.

Chairman SCHUMER. They would say that the judge should aspire to be as dispassionate and neutral as possible, in my judgment anyway, but they would admit that some types of politics enter the process. And when they ask what we do, I think they would say because we are more political, so to speak, without lifetime appointments, politics enters into it more. The quotes I read from my colleagues here before indicate that that has been the case before as well.

Mr. KMIEC. I am from the Catholic University of America and I admit sin as well, but hopefully don't aspire to it.

Senator SESSIONS. I think that is a point, Chuck. We just need to be sure that as we go through this process what we do doesn't acknowledge, affirm or encourage the politicization of the courts. That is critical. If we do that, we have done something badly. I think if every time we bring a nominee up here we pound away at them over their personal political views, I think we are going to be not encouraging them to act independently on the bench, but to feel their confirmation was based on saying the right things, and encouraging the public to have less respect than they do today for the independence of the courts.

Chairman SCHUMER. I would agree with that. I would just simply say what is politics and what is judicial philosophy are two different things, and the latter belongs as part of our inquiry, and always has and always will. That is all. To call judicial ideology politics—you can get into semantics, but it is not, I think, what people are referring to. At least I am not.

I think Professor Rotunda wanted to say something.

Mr. ROTUNDA. There are so many things to say. It is so nice that everybody is talking about me.

When you say President Reagan was happy with his appointment of Justice Scalia, I don't know. Certainly, on things like Fourth Amendment people were surprised. If abortion was the big issue, which many people said at the time, what about Justice Kennedy?

I point out in my paper if a baseball team can bat .500, that is great. But a President on the Supreme Court only gets between zero and one appointment every 4 years, 2 in his 8-year term. President Clinton got 2 in his 8-year term and both of them ruled against him in *Jones* v. *Clinton*. That probably hurt. And that is, of course, on the U.S. Supreme Court where we pay a lot of attention. What about the trial court, the district court, and the court of appeals?

The fact is, as Judge Edwards pointed out, you cannot predict how these judges will rule based on who appointed them. And, of course, we are talking not just about tomorrow, but 5 or 10 years from now. We don't know what the big issues are. When Justices Kennedy and Souter were appointed to the Court, nobody knew about *New York* v. *United States*. That issue wasn't even on the horizon.

So I think it is difficult, but you don't choose by lot. I think you want to make sure that the person is well-qualified as a lawyer and has experience either as a practitioner, academic, or in prior government service. Those are the things you look at before to make sure that the questions that come to them they will be able to understand and try to make sure they have an open mind.

We have had some great judges. Abner Mikva was a partisan, a U.S. Congressman, but a great judge. When he came to my class once, he said of one case on statutory interpretation, I knew what I wanted as a Representative, but it wasn't in the record and so I had to rule against what I knew in my heart Congress really intended. Now, not all judges will act with that kind of self-restraint, but the great judges do. That is why he was a great judge, although when he was not a judge, he was a Democrat and Congressman. But when he put on the robes, he acted as a judge.

Now, I am not surprised that a Democratic President appointed him rather than a Republican President. To the victor belongs the spoils. It is not surprising that people choose members of their own party, but they shouldn't choose anybody simply because he is of their own party. They should choose people who are qualified, such as Judge Friendly rejected his own article in one of his opinions—and that is why he became a good judge because he wasn't tied by the past. He tried to have an open mind.

How do you choose people who have an open mind? I guess if I could bottle it, I would sell it and make a mint. But I think the way we have been doing it for the last 200 years, particularly the last century, has worked well. That is why I suggest we not change what we are doing, because we have produced the best judiciary in the world under both Republican and Democratic Senates and Republican and Democratic Presidents.

Ms. RESNIK. Just for the clarity of the record, I should add that Judge Edwards was writing in response to a series of law review articles by Professor Ricky Ravesz of N.Y.U. Law School. Professor Ravesz's essays are empirical studies of the D.C. Circuit that show a cohort or collegiality effect. The judges are identified by the President that nominated them. It is not whether they are themselves personally Democratic or Republican, but they are coded by reference to the party of the President who nominated them.

In those studies, Professor Ravesz reports that there is a pattern. When two Republican-appointed judges or two Democrat-appointed judges are together, there are patterns of voting. Judge Edwards disagrees with that analysis, and there has been a series of backs-and-forths between them on this issue. My point is that some empirical literature suggest and verify Professor Tushnet's elegantly put "good bets" point. There are a number of studies that I am sure any of us who are teachers of the Federal courts would be happy to forward to the Committee.

Mr. LEVINSON. Certainly, you can understand the practitioner's devotion to forum-shopping and trying to get it. In Texas, we are particularly familiar with forum-shopping on plaintiffs' personal injury suits. Rightly or wrongly, good, experienced lawyers believe that they can predict some fairly important things, though no doubt they also do strike out on occasion.

Mr. ROTUNDA. Of course, in Texas the state have elected judges and some litigants want to get to Texas State court. It is amazing that throughout the country, it is the appointed judges that do better. Illinois has primarily an elected system. The deans of every law school in the State of Illinois for years joined the American Judicature Society in asking for an appointed system.

When you have an appointed system, you just have a better system. That is the system we have now and it works well. It worked well under President Clinton, under the first President Bush, President Reagan, President Eisenhower, and so on. It has worked well this century and I am concerned about tampering with it.

Chairman SCHUMER. On that note, we are going to thank our witnesses for what I think was an excellent exchange and helped elucidate things. I thank Senator Sessions again for his patience and camaraderie on this, and I thank everybody who stayed until the end of the hearing.

Senator SESSIONS. Mr. Chairman, I would like to include in the record two articles written by Joseph Califano and Roger Pilon.

Chairman SCHUMER. Without objection.

The hearing is adjourned.

[Whereupon, at 5:15 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow:]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

Responses of Stephen B. Presser to questions submitted by Senator Thurmond

Question 1. Assume the President nominates someone for a district or circuit judgeship who appears to be well qualified to serve because he or she, for example, has extensive legal experience, is well regarded in the local legal community, and has not had any character issues arise in background checks. At this point should the nominee have an affirmative burden to prove to the Judiciary Committee and the Senate that he would be confirmed and deserves the votes of senators, or should the opponents to the nominee have some obligation to show that the objective criteria for being qualified are not sufficient for a particular candidate?

Answer. In my opinion, Senator, if a judicial nominee appears to possess the objective qualifications which indicate high standing in the legal community of a kind that you have suggested, it is profoundly wrong to suggest that such a nominee has an "affirmative burden" of proving to the Judiciary Committee and the Senate that he or she deserves to be confirmed. The role of the Senate, as I understand it from the text of the Constitution and from the contemporary exposition of the Constitution, such as the Federalist Papers, is to fulfill an "advise and consent" role, and not to be a "co-partner" in the nomination process. As we explored in our hearing on 26 July, and as I tried to make clear in my written testimony submitted in connection with that hearing, the Senate's role is to reject a nominee where the President has failed to choose him or her based on his or her qualifications for the job, and has made a selection of a person who lacks the character or expertise for the job, or a person who has been chosen not because of qualifications, but because of particular personal, family, or social connections to the President or others. Where the President has proposed the kind of nominee you suggest, I believe that the President's choice is entitled to at least a presumption of appropriateness on the part of the Senate, if not, as has traditionally been true, some deference on the part of the Senate. The President's role is to select the nominees, and just as each branch is supposed to defer to the others in the case of specially-designated functions (for instance, there is a presumption of constitutionality with regard to acts passed by Congress when these are reviewed by the judiciary, and our tradition calls for the executive to carry out the laws passed by Congress and the orders of the Courts) so the Congress should, give a presumption of fitness for office to the President's nominees. As you imply, opponents of nominees to the bench should have the burden of proving a particular nominee unfit for the bench. It would be a strange legal system that gives defendants in criminal cases a presumption of innocence but presumes that judicial nominees are guilty of unfitness for the bench.

Question 2. Do you view judicial philosophy as a better criteria for a Senator to consider in evaluating judicial nominees than political ideology, and do you think it is important to distinguish between terms such as these when discussing the Senate's role in the confirmation process?

Answer. As I tried to make clear in my written testimony submitted in connection with the hearing on 26 June, I am convinced that "judicial philosophy" is a much sounder criteria for a Senator to consider in evaluating judicial nominees than "political ideology." I do think it is very important to distinguish these terms. As both Lloyd Cutler and C. Boyden Gray pointed out at the hearing on 26 June, it is difficult to imagine a better way to discredit the judiciary than to pick judges based on "political ideology." Our whole republic, our whole national creed that ours is a government of laws not men, is endangered if we begin to pick judges based on "political ideology." In order to implement the rule of law we must have judges who believe that objective determinations of the law and Constitution are possible, and that those interpretations are to be guided by the original understanding of the provisions to be interpreted. Any other "judicial philosophy" results in judges legislating, and not doing their constitutional task of interpreting the law. Accordingly, it is appropriate for the President to select judges who will interpret rather than

make law, and it is appropriate for the Senate to satisfy itself that this is what the President has done. To ask for the selection of judges based on "political ideology," however, suggests that the judge's politics, rather than his or her understanding of the law, will dictate results. This is profoundly wrong, at least if we believe that there is a difference between law and politics. It is true that there are some in the legal academy and, perhaps, in legal practice, who do not believe there is any difference between law and politics, but, as I have tried to make clear here and in my testimony, if there is no difference between law and politics our most basic governmental principles and beliefs for the past two hundred and twelve years have been wrong. They are not wrong, and there is a difference between law and politics, which it is the job of our high officials to recognize.

Question 3. If Senators vote on judicial nominees based on the nominee's views on particular political and public policy issues, is there a danger that the Judicial Branch will be viewed as simply another political institution no different from the Legislative Branch?

Answer. Yes, indeed, if Senators vote on judicial nominees based on the nominee's views on particular political and public policy issues, there is a very great danger that the Judicial Branch will be viewed as simply another political institution no different from the Legislative Branch. As I tried to make clear in my testimony submitted at the 26 June hearing, there is no issue that could be more important to the future of the Republic than this one. As the recent Presidential campaign emphasized, and in particular, with regard to the campaign promise of the then Governor Bush to appoint judges who would interpret and not make law, we are at a crossroads involving the future of the rule of law. For many years we have seen too many courts assume the role (wrongly in my opinion) of social policy makers, a role that is supposed to be occupied in our system only by the legislature. One cannot have a democratic republic, as ours is supposed to be, when judges rather than legislatures make the law. We are supposed to be governed according to the principle of popular sovereignty, and when the judges create and implement policy it is they, rather than the people, who rule. If our people believe that the judicial branch is "just another political institution," it will be difficult if not impossible for the people to accept the responsibility to govern themselves. This is difficult enough as it is, and it is a national tragedy that most Americans seem so disappointed with American politics, and that so few involve themselves even in the most basic political processes, such as voting and service on juries. Anything that detracts from the rule of law, from the idea that ours is a government of laws not men, is a great danger to our way of life. Picking judges on the basis of political ideology, and viewing the judiciary as just another "political institution" is such a great danger.

Thank you for the opportunity to submit these thoughts.

Response of Cass R. Sunstein to a question submitted by Senator Sessions

Question. Do you support Michael McConnell's nomination to the federal bench?

Answer. I enthusiastically support the nomination of Michael McConnell to the federal bench. He is an extremely able and open-minded person.

SUBMISSIONS FOR THE RECORD

Statement of the American Center of Law and Justice

This statement was prepare by Jay A. Sekulow, Chief Counsel, James M. Henderson, Esq., Senior Litigation Counsel, and Colby M. May, Esq., Director, Washington D.C. Office of the American Center for Law and Justice.

INTRODUCTION

A recurring and contentious question confronts anyone who considers the appropriate role of the United States Senate in the process of selecting officers of the United States, in particular judicial officers. Existing judicial vacancies and the constitutional methodology for filling them have come to the political foreground as a consequence of the recent change in the make-up of the United States Senate. The importance of the question and its answer have been highlighted as Senators have

raised anew questions,[1] Washington Post, May 26, 2001, at A13, about how the Senate will treat nominations by the President to fill up the judicial vacancies in the federal district and appellate courts, and in the Supreme Court of the United States.[2] Legal Times Online, June 7, 2001. While there are, undoubtedly, many opinions on the question, the appropriate course, we think, is to look to the Constitution itself for the answer. In this respect we agree with the view expressed by Justice Scalia, dissenting, in *Morrison* v. *Olson*, 487 U.S. 654, 697 (1988). There, objecting to the rootless and unfounded approach taken by the Courts majority to answering the question whether the statute authorizing the appointment of independent counsels met constitutional requisites, Justice Scalia urged:

> The ad hoc approach to constitutional [decision-making] has real attraction, even apart from its work-saving potential. It is guaranteed to produce a result, in every case, that will make a majority of the Court happy with the law. The law is, by definition, precisely what the majority thinks, taking all things into account, it ought to be. I prefer to rely upon the judgement of the wise men who constructed our system, and of the people who approved it, and of two centuries of history that have shown it to be sound.

Morrison, 487 U.S. at 734. The quest must be to discover the answer to the question in the text of the Constitution, and where that text is at all unclear, to discover its meaning in the judgment of the wise men who constructed our system, and of the people who approved it. . . .''

Together with the related segments of the Federalist Papers, a proper reading of the Constitution reveals a simple but grand plan for the selection and placement of officers of the United States. According to that plan, the President alone is endowed with the power to select appropriate nominees to the federal judiciary. That sole power of selecting candidates is clear and to balance against that selection the power of the Senate to refrain from confirming candidates unworthy of office by reason of character, incapacity or unfitness is also clear.

NOMINATIONS: AN EXECUTIVE PREROGATIVE SERVING THE INTERESTS IN EFFICIENT AND EFFECTIVE GOVERNMENT

In devising a structure for the government of the Nation, the Framers of the Constitution vested all executive power of the United States government in the President. The executive power shall be vested in a President of the United States of America. U.S. CONST. Art. II, Sec. 1. The Framers concluded that effective administration of the federal government not only required placing all executive power in the President, but also required delegation by the President of duties and responsibilities to others. For purposes of investing executive authority to act on behalf of

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[1] For example, the Washington Post carried an Associated Press report on the impact of the change from Republican to Democrat control of the Senate that included the following:

Cox becomes the first judicial casualty of the Democratic takeover. From the point when they learned that they would be in control of the Senate, Judiciary Democrats warned Bush that they would not let hard-right conservative nominees through the Senate.

"Judges will have to be moderate," said Sen. Charles E. Schumer (D–N.Y.), who is in line to become chairman of the Judiciary subcommittee on courts "Everything will have to be moderate."

[2] The shift in the balance of power in the United States Senate caused by the decision of Senator Jeffords to leave the Republican Party, change his party affiliation to Independent, and vote with the Democratic Caucus in the Senate for organizational purposes, guarantees significant changes in the activities of the Senate Judiciary Committee, through which all judicial nominees must pass:

A Crucial Shift at the Judiciary Committee by Jonathan Ringel

In what turned out to be his last hearing as chairman of the Senate Judiciary Committee, Utah Republican Orrin Hatch noted on May 23 that a Justice Department nominee sitting before him had the glowing endorsement of Sen. Edward Kennedy. That's high praise, Hatch added, considering that the Massachusetts Democrat had chaired the panel himself, "in the good old days."

"Soon to return," quipped Kennedy. The very next day, Vermont Sen. James Jeffords' defection from the GOP set a new course for the committee-and for President George W. Bush's judicial candidates.

"This changes every little thing," said Sen. Charles Schumer (D–N.Y.), a member of the committee and a vocal opponent of many of Bush's conservative picks. "In fact, it changes the little things more than the big things."

It's the little things that count in the committee, the gateway to Senate confirmation for judicial and Justice Department nominees.

From "blue slips" that can block a nominee from getting a confirmation vote to the role of the American Bar Association-and from the membership of the committee itself to the future composition of the federal district and circuit courts-most everything was promised a new look after Jeffords' stunning move.

the United States, the Constitution contemplates two kinds of "officers of the United States": principal officers and inferior officers.

With respect to the former category, the Constitution grants to the president alone the authority to nominate the principal officers of his government. Thus, among other constitutional duties attendant to heading the executive branch the President is charged with selecting candidates to serve as the principal officers of it, including, "ambassadors", "public ministers and consuls", "judges of the Supreme Court," as well as "all other officers of the United States, whose appointments are not herein otherwise provided for."[3] U.S. CONST. Art. 11, Sec. 2. And, as will be shown below, the nomination of inferior officers belongs to the President unless Congress acts pursuant to the Constitution to delegate that responsibility elsewhere.

After debating the possible alternatives to doing so, the Framers chose as the safest course to place within the sole hands of the Executive the power to nominate the principal "officers of the United States" and, during recesses of the Senate to fill temporarily such "vacancies that may happen. . .by granting commissions which shall expire at the end of their next session." Specifically, the Executive Article of the Constitution provides:

> The President. . .shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may bylaw vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.
>
> The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

U.S. Const. Art. 11, Sec. 2.

This passage of the Constitution also indicates the Framers' intention to impose a two step process in the selection of officers of the United States: first, nomination; and second, appointment. Moreover, the Framers chose to repose all responsibility and prerogative for nomination of principal officers with the President, but to require that appointment by the President come only with the approval of the Senate.

Of course, it was possible to devise in the Constitution other methods for selecting candidates to fill the offices of the United States. In Federalist Nos. 76 and 77, Aexander Hamilton addressed and explained the appointing power. In No. 76, Hamilton suggested that three basic approaches to the selection of candidates could be considered: "t ought either to be vested in a single man, or in a SELECT assembly of a moderate number; or in a single man, with the concurrence of such an assembly."[4] Antifederalist Nos. 76–77. For the choice made in the Constitution to share the power of appointment between the President and the Senate, the Federal Farmer found no sound reason. "This mode, for general purposes, is clearly not defensible." *Id*. As Hamilton explained, however, granting the nomination power to a single man avoided problems presented when the power was shared across a group consisting of more than one person.

First, sharing the power of appointment across a group bogs the process of filling offices of the United States at the nomination stage by increasing the number of people eligible to choose candidates. That approach could amplify certain consequences that could be injurious to the process. For example, whatever the abuses that one man might inflict in the process of selecting officers, the real probability is that such abuses would be amplified, not minimized, by spreading out onto a larger number of shoulders the burden of selection. Alexander Hamilton noted, in Federalist No. 76, the President, acting alone, "will have FEWER personal attachments to gratify, than a body of men who may each be supposed to have an equal number. . .." Consequently, Hamilton reasoned, "one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment."

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[3] An example of an officer for whom the Constitution does otherwise provide the means of selection is the President of the Senate. See U.S. Const. Art. 1, Sec. 3. ("The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided ").

[4] Richard Henry Lee, writing as the Federal Farmer in the Antifederalist Nos. 76–77, considered that six basic arrangements for disbursing the appointments power were possible:

In contemplating the necessary officers of the union, there appear to be six different modes in which, in whole or in part, the appointments may be made. 1. by the legislature; 2. by the president and the senate; 3. by the president and an executive council; 4. by the president alone; 5. by the heads of the departments; 6. by the state governments.

Second, placing the power of appointment in an individual insures that the individual in whom that power resides will be held accountable for the appropriate exercise of that power. In other words, when the authority is exercised by a body of men, each may individually hide behind the collective judgment of the body. But where only one man is permitted to act in a matter, as is the case in the nomination of principal officers of the United States, then responsibility for carrying out that duty irresponsibly cannot be avoided by hiding behind the collective judgment of some group. As Hamilton put it, "The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them." The Federalist No. 76.

The decision to vest sole power to nominate "officers" with the Executive was tempered, however, by then subjecting the Executive's power to appoint those officers to the "advice and consent of the Senate." As a consequence of this construction, the Framers created a process for the filling of offices in which the need for consultation with the Senate was deliberately back-loaded. In this way, Hamilton at least, thought the Constitution would designedly insure that the President could place within the administration that he heads, capable, competent, and honorable men whose capacity to join him in service of the people of the United States he does not doubts.[5] History has, as a general matter, born out Hamilton's judgment with respect to appointments to fill offices in the Executive branch.[6] To a much lesser extent, history has born out that judgment with respect to the appointment of judicial officers.[7]

WITH THE "ADVICE AND CONSENT OF THE SENATE": SENATORIAL PARTICIPATION IN APPOINTMENTS

While, with respect to the principal officers of the United States, the President alone *nominates*, the President *shares* the appointment power with the Senate. *See* U.S. Const. art. II, sec. 2 ("[t]he President. . .by and with the advice and consent of the Senate, shall appoint"). The Constitution does not specify, however, the means by which the Senate shall provide advice and consent, and only hints at two possible considerations.

First, in the Legislative Article, each House is empowered to make its own rules for operation: "Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member." U.S. Const. art. I, sec. 5. In accord with that constitutional authority, then, the Senate certainly is authorized to determine its own rules for how to proceed in considering appointments and in the giving of their advice and consent.

Second, in the Executive Article of the Constitution, the appointments clause is paired with the treaty making clause. *See U.S. Const. art. II, sec. 2. Moreover, both the authority to make appointments and the authority to make treaties are reposed jointly with the President and the Senate. Compare U.S. Const. art. III, sec. 2, c1.1 (treaty making clause) with U.S. Const. art. 111, sec. 2, c1.2 (appointments clause). Only one point of distinction separates the two provisions. The treaty making clause requires that two thirds of Senators present must concur in the making of a treaty, but does not provide any numerical limitation with respect to the giving of advice and consent.*

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[5] The Federal Farmer, to the contrary, feared senatorial participation in appointment. He was concerned: (1) that allowing the Senate to participate in appointment would take from it its pure and unbiased judgment regarding the performance of officers brought before it for judgment; (2) that doing so would make the Senate the real seat of federal government ("[t]he consequence will be that the senate, with these efficient means of influence, will not only dictate, probably, to the president, but manage the house, as the constitution now stands; and under appearances of a balanced system, in reality govern alone "). See The Antifederalist Nos. 76–77. The former fear of the Federal Farmer, that the judgments of the Senate, which would otherwise be free from appearance of bias, would now suffer that appearance, was also considered a weakness in the plan by BRUTUS, writing in the Antifederalist No. 62, on the organization and powers of the Senate ("This body will possess a strange mixture of legislative, executive, and judicial powers, which in my opinion, will in some cases clash with each other").

[6] See Robert C. Byrd, "Nominations," THE SENATE, 1789–1989 (Washington: GPO, 1991), vol. 11, at 41 (noting that, as of date written, Senate had confirmed ninety seven percent of cabinet nominees).

[7] See Robert C. Byrd, "Nominations," THE SENATE, 1789–1989 (Washington: GPO, 1991), vol. 11, at 41 (noting that, as of date written, Senate had confirmed eighty percent of Supreme Court nominees).

Without more, the legislative assumption has been that the Senate may, in keeping with Article I, section 5, make its own rules governing the process of providing advise and consent. The Senate has exercised that constitutional authority to make rules for its proceedings by authorizing senators to place holds on the consideration of nominations. The Constitution does not grant to the President the power or right to direct the Senate to proceed differently than it chooses to do in advising and consenting with respect to pending nominations.

Setting aside technical considerations about the number of Senators required to approve an appointment or the manner and timing of the provision of advice and consent, the most pressing question about the role of the Senate is the basis for consenting, or declining to consent, to the appointment of candidates nominated by the President. On this question, the Constitution is silent. Consequently, we can look for guidance in the "the judgment of the wise men who constructed our system, and of the people who approved it. . .." *Morrison*, 487 U.S. at 734 (Scalia, J., dissenting).

In addition to his arguments in the Federalist Papers, Alexander Hamilton participated in the ratifying convention for the State of New York. There, in addressing the nature and construction of the Senate and its role in the general government he expressed a view that may inform one who considers this issue. In Hamilton's view, the Senate was constructed, not as a check against the Executive branch, but as a check against the State governments. See Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution, vol. 2, at 317 (Ayer Co. 1987). Thus, at least to Hamilton, "advice and consent" must have meant more than merely a means of obstructing the appointment of otherwise eligible persons to office.

In the Federalist No. 76, Hamilton also makes the point that advice and consent is not a tool for subverting the Executive's sole authority to nominate:

> But might not [the President's] nomination be overruled? I grant it might, yet this could only be to make place for another nomination by himself. The person ultimately appointed must be the object of his preference, though perhaps not in the first degree. It is also not very probable that his nomination would often be overruled. The Senate could not be tempted, by the preference they might feel to another, to reject the one proposed; because they could not assure themselves, that the person they might wish would be brought forward by a second or by any subsequent nomination. They could not even be certain, that a future nomination would present a candidate in any degree more acceptable to them; and as their dissent might cast a kind of stigma upon the individual rejected, and might have the appearance of a reflection upon the judgment of the chief magistrate, it is not likely that their sanction would often be refused, where there were not special and strong reasons for the refusal.

The Federalist No. 76.

Of course, it is customary, though not constitutionally required, for the Executive to subject certain nominees for consideration by individual Senators. So called "senatorial courtesy" is a practice limited to instances in which the territorial jurisdiction of an office to which an appointment will be made falls within any particular state of the Union.[8] In such circumstances, it is expected that the President will present his proposed nominees to the Senators of the state affected for their consideration. But expected courtesies, given or not, would not, in Hamilton's view, justify a vote not to confirm a nominee where the sole reason for opposition is the hope, hidden or expressed, that another, favored by the Senator, should have the office.[9]

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[8] See Robert C. Byrd, "Nominations," THE SENATE, 1789–1989 (Washington: GPO, 1991), vol. 11, at 31 et sea.

[9] At the North Carolina ratifying convention, James Iredell expressed the view that Senators would risk being "reprobated" if they withheld their consent without just cause:

> As to offices, the Senate has no other influence but a restraint on improper appointments. The President proposes such a man for such an office. The Senate has to consider upon it. If they think him improper, the President must nominate another, whose appointment ultimately again depends upon the Senate. Suppose a man nominated by the President; with what face would any senator object to him without a good reason? There must be some decorum in every public body. He would not say, "I do not choose this man, because a friend of mine wants the office." Were he to object to the nomination of the President, without assigning any reason, his conduct would be reprobated, and still might not answer his purpose. Were an office to be vacant, for which a hundred men on the continent were equally well qualified, there would be a hundred chances to one whether his friend would be nominated to it.

Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution, vol. 4, at 134 (Ayer Co. 1987). Iredell was later appointed as one of the original associate

Continued

Ultimately, in the Federalist No. 76, Hamilton offers what is the soundest approach to the exercise of advice and consent. Hamilton directed himself to the question of requiring the cooperation of the Senate in the appointment process. In his view, their cooperation was a salve against poor choices by the Executive:

> [T]heir concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.

The Federalist No. 76. Thus, we see that for Hamilton at least, Senate advice and consent consisted of a process by which the natural tendency of giving the spoils of political victory to the Executive was ameliorated, and by which considerations of family, friendship, faction, and popularity could be subjugated by the quest for excellence. Moreover, in his view, the Senate's participation in the appointment process would serve to stabilize the administration.[10]

The quest for stability in administrations, however, has been the source of legislative abuse. During Andrew Johnson's administration, the Congress passed, over Johnson's veto, the Tenure of Office Act. That Act gave duration in office to persons confirmed by Senate vote, allowing them to retain their offices until a successor was both nominated and confirmed. It was Johnson's disregard for that Act that led to his impeachment and near removal from office. Ultimately, however, the Supreme Court concluded that the Act was unconstitutional. See Robert C. Byrd, "Nominations," THE SENATE, 1789–1989 (Washington: GPO, 1991), vol.11, at 36; see also *Myers* v. *United States*, 272 U.S. 52 (1926) (declaring tenure provision unconstitutional).

CONCLUSION

Both the Executive and the Senate share a common duty to the people of the United States to place in offices of the United States persons of trustworthy character, and capable and suited to the performance of the duties of their office. The selection of suitable candidates for the principle officers of the United States is the Executive's alone (tempered by the practice of Senatorial courtesy in cases of such offices as fall alone within the boundaries of one state). But the appointment of the candidate to the office is a shared exercise. That exercise must be suited to the duty owed to the people of the United States.

To deny the appointments of a President because the candidate is incompetent to serve is no abuse of the duty of advice and consent. To the contrary, it is the role of the Senate to prevent considerations of family, friendship and the like from being the basis upon which such appointments are made. But to deny the appointments of a President because the candidate, though fully suited to the tasks of the office, holds political opinions different from those of the Senate (or of individual senators) is precisely the abuse that Hamilton suggests the advice and consent provision was not intended to accommodate.

Statement of Professor Lillian R. BeVier, University of Virginia Law School

In connection with its hearing on Tuesday, June 26, 2001, entitled "Should Ideology Matter?" Judicial Nomination 2001," I have been requested to submit this witness statement to the Senate Judiciary Subcommittee on Administrative Oversight and the Courts. It is an honor for me to do so.

I was nominated by President George Bush to the Fourth Circuit Court of Appeals in October 1991. My nomination lapsed when President Clinton was elected thirteen months later. Despite the fact that I received a qualified rating from the ABA, and had the support of both my home state senators, then-Senator Robb and Senator Warner, the Judiciary Committee, chaired at that time by Senator Biden, refused to hold a hearing on my nomination. Not having been informed of the reasons why the Committee was unwilling even to give me a hearing, I prefer not to speculate about them. To the extent the reasons for refusing me a hearing reflected concern with my philosophy of judging, I would have valued at least a chance to answer

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justices to serve on the Supreme Court by President George Washington. See http://www.britannica.com/seo/J*/J*ames-iredell.

[10]

their questions in a public forum and to get my views on record. While in my view it would have been improper for the Committee to have probed my political ideology or to have queried me about how I expected to rule on particular cases, I would have welcomed the opportunity to explain my judicial philosophy. In the paragraphs that follow I offer at least a partial explanation.

Questions of judicial philosophy are not first and foremost questions about the merits of particular constitutional controversies. They are not primarily questions of what actual limits shall exist on federal legislative power or of how power between the President and Congress shall be divided in the federal system or of whether the 14th Amendment incorporates the provisions of the Bill of Rights into a "one-size-fits-all" set of rules for the treatment of accused criminal defendants or even of whether the Constitution is color blind. Important as these questions are, questions of judicial philosophy are even more fundamental, for they raise issues not of what should be decided but who (i.e., what institution of government) should decide, what is the source of their power to do so, and by what criteria are their decisions to be guided and evaluated. At one extreme, shall it be the Justices of the Supreme Court who decide according to their own—or some law clerk or law professor's—notions of what is good for the country? Or , at the other end of the spectrum of views, shall it be the framers of the Constitution, the text they wrote and the intentions they embodied therein—with the current Justices acting as their agents to interpret as faithfully and impersonally as humanly possible the document the framers wrote?

The arguments that are often put forth in behalf of some form judicial activism, or nonoriginalism, or a-originalism, are often intellectually sophisticated, sometimes eloquent, usually nonlegal. They self-consciously eschew "formalism," and nearly always come adorned with practically irresistible rhetorical embellishments. They invoke the Constitution's "aspiration to social justice, brotherhood, and human dignity;" they insist that adhering to the values of 1789 entails "turning a blind eye to progress" and that doing so ignores "the transformative purpose of the text." Anyway, they claim, it's either "too difficult"—maybe it's impossible—to know what the framers meant by the words they chose; or it's just too horrible to contemplate the straight jacket that adhering to the Founders' commands would impose upon "our" ability to accomplish a "progressive" political and social agenda. Stripped of their considerable academic gloss, the arguments of the nonoriginalists tend to boil down to this: if the Supreme Court is constrained by an obligation of fidelity to the text of the Framers, then we might not be able to get the results we want when we want them. We might have to wait, and go through other channels, to secure the right to abortion, gender equality, the right to remain silent when questioned by the police (but NOT when you might be praying in school). And if the nonorginalists' arguments did not—most of them—appear in law reviews and were not—most of them—made by law professors, you would hardly have a clue that they were supposed to be part of a debate about the legal authority of judges to accomplish those results. You'd think instead that the debate was strictly and purely a political or policy debate about what the law of today should be, and that any person in her right mind would agree that once "we've" decided what we think the law should be, it follows a fortiori that judges can reach that result under cover of the Constitution.

On the other hand, the arguments in behalf of orginalism or textualism or the structural constitution seldom stray far from the question of the legal authority of judges. They are utterly preoccupied with questions of the legitimacy of judicial power. That is why they begin from an uncompromising premise, and end with an uncompromising solution. The text of the written Constitution is law, right? Right. The Constitution is the sole source of the power of judicial review, right? Right. It confers power upon -and thus legitimates the power of—the Justices of the Supreme Court to set aside the acts of the other branches of the federal government and of the States, right? Right! But, being the sole source of the legitimacy of that power, the Constitution also specifies the limits of its legitimate exercise, right? Right! Those who argue in behalf of originalism or textualism or the structural constitution are not prone to talk about brotherhood, human dignity, moral evolution, adaptability, flexibility or any other of those neat progressive things. They tend to talk about LAW, and about the Courts legal authority to do ANYTHING. And when that's the framework—when that's the question—originalism, textualism, and the structural constitution seem axiomatic.

The antagonists in the *orginalism/textualism* vs. *nonoriginalism* debate focus on utterly different issues. Originalists and textualists talk in terms of uncompromising first principles while nonoriginalists, unable to accept a regime that places such an obstacle in the way of judges' ability to achieve the results they desire in particular cases talk in terms of progress and flexibility and most especially of outcomes in pending cases and of what they want now.

Originalism and textualism are the legal equivalents of abstinence from sex by unmarried teens: they are simple, straightforward, uncompromising solutions that pay heed to a command more permanent than that of the moment, that require self-restraint, that entail delayed gratification, but that do not erect permanent roadblocks to the eventual legitimate satisfaction of desire.

Originalists and textualists tend to ground their arguments primarily on a foundation of legitimacy. They seem wedded to this question of principle, and to what the law requires. Even when they turn to instrumental defenses, they tend to stress originalism and textualism's legalistic" virtues—of stability, predictability, and clarity. I endorse these virtues and think originalism serves them relatively well. But originalism and textualism possess two other virtues: the first is inter it . The second is deliberate impersonality—and hence the universal accessibility—of the decision-making criteria they supply.

First, integrity. Many proponents of originalism and textualism notice and bemoan the discrepancy between what the court does—and what its nonoriginalist cheerleaders urge it to do—and what it says it does. And the originalists urge upon the court the simple virtue of candor: as Judge Posner has noted, "Originalism is the legal professor's orthodox mode of justification." So, originalists and textualists say, you should align your practice with your preaching. And to the extent it continues to condone this "orthodox mode of justification" while in fact rejecting its premise, the nonoriginalist position is irredeemably hypocritical and essentially dishonest.

Nonoriginalists intone along with the rest of us that we are fortunate indeed to have a government "of laws and not of men." But, whereas they appreciate that whenever the coercive power of the state (or of the Supreme Court exercising the power of judicial review) is brought to bear it must be wearing an apparent cloak of legal legitimacy, they in fact seem to have but little respect for law, at least insofar as law might be a constraint on either the Court or on their own arguments about what the court should, must, may do.

I suggest that the hypocrisy of many of the nonoriginalist arguments—the deliberate masking of their real agenda, the lack of condor, the absence of respect or even acknowledgement of law as a constraint on themselves as well as others—all of these features exert a corrupting influence on the enterprise—on the very idea—of law itself. Thus, in my view, an important function of originalism is to exemplify, enforce, and sustain the rule of law.

A second virtue of originalism and textualism is the impersonality of their decision-making criteria. In a way, to notice this aspect of orginalism or textualism is merely to work a variation on the familiar juxtaposition of the objectively specified, relatively determinate relatively disinterested nature of originalist or text-bound decision-making criteria and the often arbitrary, unpredictable, unspecified, partisan, subjectively chosen criteria that nonoriginalists use. To speak of the impersonality of originalism's criteria is to invoke all the virtues of objectivity and by implication to deplore subjective judging. But it also is to emphasize the particular importance of impersonality as a characteristic of the criteria that judges use to decide cases. The outcome of any judicial process is supposed to be a function of impartial—i.e., unbiased, disinterested—judges deciding cases based on the evidence submitted in court and the arguments of counsel. Participation in the process by litigants is rendered meaningful by the fact that the playing field is supposed to be level: it is levelled by rules—rules of admissibility, rules of evidence; rules of decision specified in advance. These rules supposedly constrain ALL the players, including the judges. But when judges don't play by these rules—either because they change them in the middle of the game or because they simply pay them lip service while actually being guided by their own views of good policy, then the game is essentially rigged. Advocates whose cases are subjected to this kind of rigging are in much the same position as voters are when the other side stuffs the ballot box: they are for all practical purposes disenfranchised, their opportunity to make their case, to present their arguments, to persuade the court rendered chimerical by the fact that the outcome has already been decided, and on the basis of criteria they neither knew would govern nor could help to shape. What a charade the judicial process then becomes—how empty its promise of equal justice under law! You wonder why some of the advocates even bother to show up!

It seems to me to be the essence of unfairness to litigants, who think they are getting their day in court and that their arguments are to a purpose, to have their cases decided by judges who in fact are listening only to their own inner voices, and who view themselves as being constrained only by their own sense of what's good for the country. Originalism and textualism are more fair to litigants than this if only because its decision-making criteria are deliberately external to the judges who

apply them, they are accessible to all, and they constrain ALL the participants in the game—including, most especially, the referees.

But when the issue of judicial philosophy is approached in more pragmatic terms, another reason emerges why courts should respect their own institutional limitations: the reason is that as social engineers on a grand scale they are simply incompetent. In other words, when one considers simply the quality of governance that is likely to emerge, there is good reason for courts to stay within the institutional boundaries that the framers established when they separated and divided power among the three branches. Institutional specialization has several under appreciated virtues, and asking courts to be the engine of social change in our complex society makes as much sense as asking your word processor to cook your dinner for you: it's just not the job it was designed to do.

This submission is not the right place fully to develop this theme, but one or two observations may help make the point. Fist, the nature of and differences between the tasks that the Constitution assigns to the various branches—making, enforcing, and applying the law—are notoriously imprecise. Nevertheless, one can infer quite a lot about the kinds of tasks that the framers meant to assign to the judiciary by looking at how the judicial process works how do judges get their information, for example, and how does their agenda get set and who gets to participate in the process; who are judges accountable to and what kinds of arguments persuade them. One can get a sense of comparative institutional advantage with respect to certain kinds of questions by comparing the judicial with the legislative process along these dimensions. Very briefly, think for a moment about the implications of the fact that the judicial process is designed (and constitutionally limited by virtue of the case or controversy requirement) to resolve existing disputes between two parties. The court waits passively for the parties to bring the dispute before it, and when they do the court constrains their presentations by rules that limit them to presenting only relevant and probative evidence. The court decides the outcome based on supposedly preexisting rules as applied to facts that the parties prove and in response to arguments that the parties make. Persons who may be very substantially affected by the outcome but who are not parties to the suit have no claim on the court's time, and there is certainly no guarantee that the parties themselves will present the "whole story" about the implications of a court decision one way or another. The court's decisions have retroactive effect as a matter of course. Because judges in the federal system have life tenure, they are formally accountable to no constituency for their mistakes of either law or policy. Their professional colleagues might criticize them, and lawyers might scream bloody murder, and the press might go ballistic, and law professors might have a field day, but no formal mechanism of accountability exists.

The most obvious difference in the institutional design of the legislative branch is of course the electoral accountability of legislators: formally, at least, they rish defeat at the next election should they make "mistakes." But there are other equally important differences in institutional design: the legislature is not constrained in its agenda-setting as courts are-it has almost total discretion to set its own agenda, from war to welfare reform. The legislature is not constrained to make decisions based on relevant or probative evidence, nor must it remain neutral or free from partisan influences. Indeed, legislative decisions are paradigmatically the outcome of interest group pressures; log-rolling and interest group bargaining are the norm. Although legislatures are not constitutionally required to listed to all affected parties, they generally tend to try to do so (at least if the parties are well-enough organized to realize that their interests are likely to be affected by pending legislation). It is in the self-interest of legislators to obtain as much information about the likely impacts of what they plan to do before they do it, so that their chances for reelection are not jeopardized by unexpected fallout from their legislative product.

The basic point is that one of the chief differences in institutional design between courts and legislatures has to do with their access to information about the nature of the problems that come before them. As compared to legislatures, the information that courts receive is backward looking, the data base upon which their decisions rest is extraordinarily limited, and there is no systematic way for them to acquire knowledge about the likely effects of their decisions. This fact alone suggests that, the more complex the problem, the more constrained should be the judicial role in solving it. The reason is that good decision-making requires more than good intentions. One of the principal problems that bedevils policymakers today, in fact, is that good intentions are almost always sabotaged by unintended unforeseen undesired and wholly unwanted consequences. This is because policymakers tend to assume that people will comply with their edicts and they forget to inform themselves about what will happen when people take quite reasonable and legal steps to avoid compliance.

Well-intentioned decision-makers with laudable goals are not enough to insure good decision-making. Good decision-making cannot proceed in the absence of good information, for if you do not know what the facts are, if you've only been told part of the story, and if you cannot predict and have no way of calculating the likely effects of your decisions and the kinds of evasive actions your decisions will induce in affected parties, you are going to mess up! With complex social problems, courts-comparatively speaking-don't know enough and can't possibly find out enough because of the way their information-gathering processes have been designed. To acknowledge this fact says nothing about the judiciary's supposed comparative advantage at implementing values, and precious little about their universally acknowledged obligation to protect constitutional rights. It says a lot about their comparative disadvantage at knowing what they are doing and what the consequences are likely to be. And it suggests a very pragmatic reason why untethered judicial activism may create problems, and itself constitutes a powerful argument in behalf of a judicial philosophy of originalism, textualism and structuralism.

Statement of Detective Patrick Boyle, Philadelphia Police Department

Senators, please allow me to introduce myself, my name is Patrick Boyle; I am a Detective with the Philadelphia Police Department. I .have been a member of the Police Department for 35 years. In 1997, I was invited to give testimony before a Congressional Committee and also a Senate Committee. The subject at both of those hearings was "Judicial Activism and Its Impact."

I was indeed honored to appear before both of those Committees. Once again, I have been asked to at least submit this written testimony before another Senate Committee at the request of Senator Jeff Sessions.

,Some of you may be wondering why a Police Detective would be asked to give testimony concerning the selection. and appointment of Federal Judges. Please allow me to explain. A Federal Judge in Philadelphia imposed a prison cap on the City of Philadelphia in 1987 or 1988. This action was taken without any court finding; that unconstitutional conditions or over crowding ever existed. The City of Philadelphia was convicted, as in the famous Irish ballad "Joe McDonald", without crime ox without trial. The Philadelphia District Attorney was denied the right to intervene and challenge the lawfulness of this decree. Mayor Rendell and the Justice Department asked the .federal court to end the prison cap, as a public safety consideration, but the court refused to even hear the merits of the motion. As an example of the effects of this decree, suspects charged with certain offenses were not incarcerated nor required to post any type of bond to ensure their appearance at trial. A sampling of the offenses are; car jacking, stalking, drug dealing, burglary, some robberies, firearms violations, Terroristic threats, auto theft, drunk driving manslaughter and vehicular homicide. Any person charged with any of these crimes was released without posting any bond and given a further court date to appear. I am sure that no one on this panel would be surprised at the results—no one came to court. This procedure was repeated over and over, arrested, bench warrant, arrested, bench warrant. On average 68% of all defendants failed to appear in court. The number of outstanding bench warrants rose from 18,000 in 1988 to close to 50,000 in 1994. In 1991, over 8,000 defendants released under the "prison cap" were rearrested. for new charges including 77 murders, 850 burglaries and over 1,000 robberies.

The year 1991 was the worst year of my life. In June of 1990 I was extremely proud when my Son, Daniel Boyle followed my footsteps into the ranks of the Philadelphia Police Department. Danny, after graduating from the Police Academy began working the streets of our City. On February 4, 1991 while working the midnight shift, Danny stopped a stolen vehicle traveling the wrong way on a one-way street. The operator of this vehicle jumped from the auto and immediately began firing a 9 mm handgun at my Son. One of the 13 shots struck Danny in the right temple. Danny died 2 days later on February 6, 1991. Dan served the City for one year and one day.

Danny's killer was arrested, tried and convicted of .first-degree murder. At the end of the trial and after the jury imposed the sentence of death; the presiding Judge informed us in open court that this murder should never have happened, that Danny should be with us today but that the killer had been arrested and released time and time again because of the prison cap. As you can see by the statistics mentioned above we are not the only victims of this miscarriage of justice, many others have been affected by this outrage.

This distinguished body now knows why I have been asked to submit my thoughts on the issue of Judicial Antiviam—I feel cure that no one condones what occurred to Danny or any of the other victims because of the prison cap. As you proceed with the hearings on the selection of Federal appointments to the bench please remember that you, the Congress of the United States of America, are empowered to enact our laws, not our Judges. I would be the last person on earth who would be pleased with any Judge that was so far to the right or to the left that he or she could infringe on our basic freedoms.

While I am not a lawyer, I do have thirty-five years experience with the criminal justice system. You are our elected representatives, each of you have the responsibility to see that your powers of enacting our laws are not usurped by the appointments (for life) of Judges whose power seems, at least to me, in some cases unchecked. I fully understand the Political nature of all that goes on in our Capital but please remember the ramifications of your decisions will have a lasting effect on all of the Citizens of this great Country. I would never want any other parent to suffer the loss our family has had to endure because of an open door policy in the prison system, enforced by a Federal judge. Thank you.

Article from Washington Post by Joseph A. Califano, Jr., Friday, August 31, 2001

YES, LITMUS-TEST JUDGES

In considering presidential nominees for district and appellate judgeships, professional qualification alone should no longer be considered a ticket to a seat on the bench.

For years partisan gridlock and political pandering for campaign dollars have led to failures of the Congress and White House, whether Democratic or Republican, to legislate and execute laws on a variety of matters of urgent concern to our citizens. As a result, the federal courts have become increasingly powerful architects of public policy, and those who seek such power must be judged in the spotlight of that reality.

Years ago battles of the bench were pretty much limited to the Supreme Court: FDR's effort to stack the court with New Dealers, Johnson's attempt to name Abe Fortas chief justice, Nixon's push to seat Clement Haynsworth and Harrold Carswell, and the in-your-face street fights over Robert Bork and Clarence Thomas. Senate scrutiny was painstaking because the nine justices have such a potent voice in setting national policy.

In those days, when it came to lower-court nominees, senators deferred to the wishes—and litmus tests—of their colleagues from the nominee's state and the president. Until Lyndon Johnson moved into the Oval Office, southern senators such as Mississippi's John Eastland, then Judiciary Committee chairman, insisted that presidents (including John F. Kennedy) nominate segregationist federal judges in their states. LBJ believed Kennedy had made a mistake in bowing to these senators. If there was to be a litmus test, it would be his.

As a result, in selecting judicial nominees, those of us who helped check them out and interviewed them nailed down their views on civil rights, desegregation and racial justice. LBJ's insistence on this cost him the friendship of his mentor, Georgia senator Richard Russell, over a federal appellate court seat.

The litmus test of recent years has focused on the pro-life or pro-choice views of nominees. It is as inconceivable that Ronald Reagan would have sent the Senate a decidedly pro-choice nominee as it was that Bill Clinton would have named a pro-life one.

Litmus tests are nothing new. What's new is the growing role of federal courts in crafting national policies once considered the exclusive preserve of the legislature and executive. As gridlock and big money have stymied the House and Senate and shaped the way laws are executed, concerned citizens have gone to court with petitions they once would have taken to legislators and executive appointees. As the federal courts have moved to fill the public policy vacuum, conservatives, liberals and a host of special interests have developed a sharp eye for those nominated to sit on the bench. So should the Senate.

The failure of Congress to enact sensible public health policies regarding tobacco to protect our children from nicotine pushers sent anti-smoking advocates to federal court to draft a settlement agreement with provisions that read like sections of a federal statute. While Republican and Democratic administrations and Congresses

have been fiddling over a patients' bill of rights, patients have gone to federal court for relief likely to have at least as much impact on health maintenance organizations as anything the politicians at both ends of Pennsylvania Avenue can cobble together.

Despairing of more effective legislative or executive action, many cities are asking federal district judges for damages and court orders to restrict the way manufacturers sell handguns and other firearms. Federal District Judge Colleen Kollar-Kotelly's final orders to remedy Microsoft's monopolization may have more to say about the development of the Internet economy that any president, House speaker or Senate majority leader.

When the executive does act, say on cigarette marketing or environmental protection, adversely affected businesses rush to court to overturn its actions and regulations. The big bankrollers of drug legalization like George Soros know the difference between a federal judge who can find a way to uphold state medical marijuana laws and one who will find that federal statutes preempt them.

Environmentalists, prison reformers and consumer advocates have learned that what can't be won in the legislature or executive may be achievable in a federal district court where a sympathetic judge sits.

Federal district judges are the lords of their realms, and unless they open the gates, it can be impossible for the litigating parties to get out once they enter the courtroom kingdom. These judges can hold cases for years, tying up businesses and regulating prisons, cities and schools with detailed court orders.

The battle over who fills the record number of judicial vacancies has taken on an importance unimaginable just a generation ago. Who sits in federal district and appellate courts is more important than the struggle over the budget, the level of defense spending, second-guessing the tax bill and whose fingers are poised to dip into the Social Security and Medicare cookie jars.

President Bush and Republican Sen. Orrin Hatch understand this as surely as Democratic Senate Judiciary Chairman Patrick Leahy and subcommittee Chairman Charles Schumer do. Both sides know that many of the individuals who fill these seats will have more power over tobacco policy, prison reform, control of HMOs, the death penalty, abortion, environmental issues, the constitutionality of redistricting for House elections, gun control and the rights of women and minorities than the president or congressional leaders, and for a longer period of time.

That's why professional qualifications should be only the threshold step in the climb of judicial nominees to Senate confirmation. There is not sufficient time to examine each lower federal court nominee with the penetrating policy MRI reserved for Supreme Court justices. But the Senate must take enough time to give these men and women the kind of searching review their sweeping power to make national policies deserves.

The writer is president of the National Center on Addiction and Substance Abuse at Columbia University. He was Lyndon Johnson's special assistant for domestic affairs and secretary of health, education and welfare from 1977 to 1979.

Statement of Ronald A. Cass, Dean, Boston University School of Law

Thank you, Mr. Chairman and Committee members for giving me the opportunity to submit testimony on this important issue. Let me begin by emphasizing that this testimony reflects only my own, personal view s, not those of Boston University or any other entity.

PERSONAL QUALIFICATIONS.

Before turning to the matter at hand, I will describe my background. I am presently the Dean of Boston University School of Law and the Melville Madison Bigelow Professor of Law at Boston University. I have been a lawyer for more than twenty-five years. I have practiced law and have served in government as an attorney and as a presidential appointee, gaining first-hand experience in one version of the Senate confirmation process. I also have taught and written about constitutional law, administrative law, the judicial process, and the performance and selection of judges. My most recent book, The Rule of Law in America (Johns Hopkins University Press, 2001), deals at some length with the manner in which judicial decisions are made. I am a past President of the American Law Deans Association, past Chair of the Section of Administrative Law and Regulatory Practice of the American Bar Association, a current member of the ABA's House of Delegates, and a member of the American Law Institute. These comments draw on my experiences in these dif-

ferent capacities but reflect only my own judgments. They have not been screened by and are not endorsed by any organization with which I am associated.

ANTECEDENT ISSUE: WHAT JUDGES DO

The question before this Subcommittee plainly is not freestanding. The initial question respecting the confirmation of judges is not the assignment of burdens but description of the job that you are considering providing advice on and consent to—what, in other words, is it that federal judges do? There is a great deal of mythology on this matter. When that is put aside, the task of the Senate in the confirmation process becomes much easier to see.

Despite the public attention focused on a small number of controversial decisions, the job of a federal judge almost entirely consists of the resolution of well-defined conflicts over the meaning of reasonably determinate legal authorities. Federal judges are not given a wide-ranging mandate to announce rules of their own choosing. They are instructed to decide which of two (or several) possible interpretations of law—of statutory directives, of constitutional provisions, or of prior judicial decisions—fits better with the governing legal authorities. And that, in fact, is what they do. Evaluation of the work of federal judges strongly suggests that they primarily (without exaggeration one might say almost exclusively) are engaged in the application of sound technical legal skills—the skills of reading, parsing, and interpreting legal authorities—to a shifting set of controversies.

This is not necessarily a simple task. It can, in fact, be quite difficult. That is why you want judges with demonstrated competence at the skills that are needed for legal interpretation. That is why we care whether judges have been successful as scholars and lawyers in showing the ability to perform the interpretive task at the heart of the judicial enterprise. But there is incredibly widespread accord among judges that this is indeed what judges do.

Because the judge's job is principally an exercise in the application of skills generally described as "legal reasoning," little of what judges do is controversial so long as judges have the competence to perform their interpretive tasks. Most legal actions—about 1.2 million in federal courts each year—are settled by the parties without a judge's decision. The cases that federal judges decide are less apt to be controversial because of different views of the law than because parties disagree with findings of fact. Because of that—and because appellate courts defer to lower court findings of fact—relatively few cases disposed of at the district court level are appealed. The lack of controversy over the typical federal court decision can be seen from statistics. Consider, for example, that almost 80 percent of the cases decided by the U.S. Court of Appeals (the level just below the Supreme Court) are disposed of without published opinion, indicating agreement that these are fairly simple decisions. For the remaining fifth of appellate cases that generate published opinions, the vast majority are unanimous decisions. Even where judges think an issue is important and not settled, they tend to agree on the correct outcome.

IDEOLOGY VERSUS INTERPRETATION

There are, of course, commentators who argue that judges use ideology to decide important matters. That argument is a hardy perennial, and scholars have been attempting to understand judges' actions through the lens of ideology for many years. It is a remarkably unhelpful lens for all but the rarest judges or the rarest cases. Doubtless, there are some judges who use ideology as an element in their decision-making, and there are some decisions that are affected by judges' views on matters that cannot be described as technical, interpretive issues. But these are not the ordinary occurrence. They are unusual, and we should not design our procedures with respect to the selection and confirmation of judges as if this aberration were the norm.

The evidence supporting the ideology argument is remarkably weak. If the argument is understood as a general statement that ideology provides a dominant explanation for judicial decisions, there is almost no credible evidence to support it. How would it explain, for instance, the incredibly high level of agreement among U.S. Court of Appeals judges from different backgrounds, different political affiliations, and different asserted ideologies? It is most often used in argument over the Supreme Court of the United States. That court culls its caseload of 70–100 cases a year (a mere eight one-thousandth of one percent of the total number of legal actions each year in the US) from thousands of petitions to select the most important and legally indeterminate cases. If any set of cases in any court in the nation is to provide evidence to support the ideological dominance claim, this should be it. Yet, even here the explanation falters. If ideology dominates other decisional factors,

why is the Supreme Court unanimous in more than 40 percent of its cases for a typical term?

There is a less aggressive argument for the role of ideology which is more plausible, but it still does not provide a good basis for abandoning the general understanding of what courts do. This less aggressive argument is that judges principally decide cases on the basis of technical considerations respecting legal authorities. They endeavor to make sense of the language used in statutes, constitutional provisions, and judicial precedents, using rules of construction that are relatively free of ideological freight. But, the argument goes, inevitably in some instances this approach has leeway for different outcomes there is space left among the legal authorities for different conclusions about the exact shape of the rule that governs a particular conflict. When that happens, judges must attempt to divine what is most reasonable, what best harmonizes the different strands of authority. That task ineluctably leads to consideration of policy issues, of values to be placed on different results, of weights to be given to competing interests. In that setting, even judges attempting earnestly to give a reasoned interpretation to legal texts will be influenced—perhaps subtly, perhaps not—by their ideology.

Of course, this version of the ideology argument is, on one level, correct. The less certain the outcome of a legal dispute governed by ordinary interpretive techniques that command widespread adherence, the more likely it is that other factors will come into play. The more the issue at hand requires consideration of factors that will receive different evaluations—factors that cannot be subjected readily to objective tests—the more likely it is that the judge's own subjective evaluation will be described as influenced by ideology.

That, however, does not get the ideology proponents where they need to go. The explanation seems plausible in large part because it recognizes what should be evident to all observers of judicial decisionmaking: that the dominant influences on judicial decisions are the quality of the legal authorities and the competence of the decision-maker, not the decision-maker's political or other inclinations. The explanation, in other words, gains force largely because it adopts the position opposed to ideological dominance as its base. Moreover, the argument that is left now from the proposition that ideology governs judicial decisions is the tautological observation that when the usually dominant technical considerations don't give a clear answer, the answer will not rest purely on technical considerations. That is so, but so what? Almost any life experience of a decision-maker may exercise some influence over decisions that in some respect are "up for grabs," but unless there is a clear and direct connection between some specific, discernable influence and a significant set of outcomes, there is little to be gained by pursuing the various possibilities. Any inquiry in this vein is apt to be more theatrics than analysis.

Perhaps most critical to the flaw in the ideology argument is this: efforts to make judicial decisions seem the product of ideology must provide oversimplified definitions of ideology if they are to work. The effort is to tie judges to a political party or a specific perspective that can be defined in linear fashion—this judge has Republican or Democratic leanings, that judge is liberal or conservative, and so on. These characterizations may work tolerably well over a set of issues, but only as rough proxies for a more complicated set of views that do not graph cleanly in a linear mode. Consider, for example, Supreme Court Justice Antonin Scalia, frequently caricatured as the epitome of the ideological, conservative jurist, voting this past term that the Fourth Amendment to the Constitution prohibits police from conducting warrantless, thermalimage searches of homes. Or consider Justice David Souter, often described by conservative commentators as reflexively liberal, voting this past term to allow police to arrest and jail a woman whose children, in violation of the law, were not wearing seatbelts in their car. Neither of those votes fits the simple liberal-conservative stereotype because the stereotype does not really explain the considerations that inform the justices' decisions. And it surely does not explain the considerations that typically inform other judges' decisions, even in difficult matters not covered by well-defined legal precepts.

Once you abandon the fiction that the linear description actually tells you what is going on, however, the already weak argument for ideology's influence becomes much weaker. The more complicated set of views that may affect the judges' decisions will not look so much like ideology because it is complex. The complexity means that judges do not simply act on the basis of beliefs that fit readily with the sort of politically charged description of views that usually gets referred to as ideology—not even as a prompt for decision-making in difficult cases with open-textured legal authorities. They evaluate the pros and cons of arguments according to an enormously rich set of understandings of facts and values that cannot easily be conflated to an ideological bias. Even where judges must bring something to bear

other than mere technical legal skills to generate a decision, ideology will be a poor explanation of their decision processes.

So, why then, is the ideology argument—the assertion of ideology's prominent role in judicial decision-making—pressed by some very smart and thoughtful people? The fact that this argument has force among a certain group of commentators must be understood in light of the commentators' perspective. This is an argument that appeals to those, such as law professors, who professionally focus on the least predictable cases. Law professors spend most of our time on cases that are interesting to us for the same reason that ornithologists are intrigued by sighting the least common birds. There is little for professional critics to say about the application of well-established bodies of law to a reasonably ordinary set of facts. Unpredictable cases—ones in which either the law is much less well-specified than the norm or something has gone off the normal course in court—are the only cases we are apt to spend time and energy discussing.

Yet it is a mistake to try to understand the legal system based on these cases as if they were the normal judicial fare. These cases are to the general population of legal cases as the rarest cancer cases are to matters of general public health. They are what matters to us, what interests us—and we come naturally to exaggerate their frequency and their importance, just as oncologists tend to see the world as if it were basically a cancer ward. For all of our fascination with cancer, it is dwarfed as a cause of death in the world by dysentery, diahhrea, malnutrition, and malaria. In the United States, it pales in comparison to heart disease. And survival to a much older age is more normal than early death from any of these causes. Cancer is a much more difficult disease to understand than dysentery and the like, which is why we worry about it and why doctors are interested in it. But we should not exaggerate its impact by mistaking it for the ordinary, expected state of the world. The same is true for legal matters where it looks like ideological considerations may play a role. The fact that such matters exist should not be taken as evidence that this is a common phenomenon or a significant problem.

CONFIRMATION: WHAT SHOULD SENATORS DO?

If judges generally base their decisions on sincere efforts to interpret governing legal authorities but at times cannot perform that task without importing other factual and normative assumptions, what should the Senate do in assessing judicial nominees? The first and most obvious lesson is that senators should pay careful attention to the technical legal qualifications of nominees. You should assure yourselves that judicial nominees have the skills they will be called upon to exercise on the bench and that there is a likelihood they will use these skills to perform the necessary interpretive tasks. Nominees who have had lackluster careers, who have not demonstrated a facility for legal analysis, or who have personal characteristics that will impede such analysis should be turned down. So, for example, in addition to assessing competence, senators might inquire whether nominees are unwilling to listen to others, for example, or have demonstrated biases that make it unlikely that some individuals will get a fair hearing.

Surely, however, the President who nominates judges will care about their views and will endeavor to select judges whose views are sympathetic in some respect. Shouldn't the Senate seek the same assurances? Even if judges' decisions are not primarily—even if they are not significantly—the products of ideology, shouldn't senators have the right to "level the playing field" by keeping presidential prerogatives within bounds?

First, one predicate for the questions presented above is undoubtedly correct: even if everything argued above about the extremely limited role of ideology in judicial decision-making is true, the presidential nomination process will be tilted toward people who generally share the President's outlook and inclinations. Those are the people who will always be most congenial to a President and who will have the greatest likelihood of sharing connections to people whose judgment the President trusts. Further, a President may care particularly about a set of views and endeavor to select nominees who share those views. A President who believes, for example, that the death penalty is a strong deterrent to the most abhorrent crimes well might endeavor not to appoint judges who are vehemently opposed to the death penalty. There is nothing untoward about this aspect of presidential selection of nominees. It is understood as part of what we get when we elect a President. Fear that a President may have views and associations too far from the comfort level of most Americans is frequently used as an argument against a particular candidate. Election certifies that the fear is not so widespread as to be a serious problem.

The fact that the President's selections will have been screened in some respect for their views does not mean that the Senate must play the role of counterweight.

To start, it is wrong to believe that the Senate gives the President a free hand in selecting nominees who will advance his interests if it forswears inquiry into such matters. Serious tests for competence and temperament rule out those nominees most likely to depart from straightforward application of governing law. Indeed, serious tests for competence and temperament are most likely to assure all parties that the judges who are confirmed, however they have come to be selected, will serve public interests over the long term, interests that are defined by our governing legal authorities.

Note, too, that even if the President wants to select judges whose views are compatible with his on some margin, it is very difficult to do that in a way that will predictably affect judicial decisions. It is difficult because, as explained above, things other than a judge's personal views dominate judicial decision-making. It is difficult because it is not a simple matter to project current views to future decisions (witness the selections of Chief Justice Earl Warren and Associate Justice William Brennan by President Eisenhower). It is easier to screen out people with well-established views contrary to the President on some matter than to "screen in" people with compatible views. Even that limited screening, however, is not easy. Presidential viewpoint screening also is difficult because the more the selection process focuses on personal views, the more it creates disincentives for prospective nominees to be fully candid—disincentives that operate throughout the appointments process. Presidents with well-known perspectives on particular issues will induce more potential nominees to profess accord with those interests. The standard check on the bona fides of such statements is whether associates of the President who know the candidate will vouch for him. While standard, this is both a very poor check on the candidate's views and very largely redundant of the process that would be used in all events.

Senatorial efforts to screen nominees' views are not likely to be very effective. The same problems that affect presidentialscreening affect senatorial screening. And the President, as the first-mover in this game, can continue to eliminate nominees who are thought most likely to disagree with the President on important matters.

Second, and more important, the effort to check a candidate's views is fraught with peril. Most obviously, it leads almost inevitably to a more strategic and more hostile set of interactions between President and Senate. Although proponents of such screening commonly assert that it need not be so, those proponents—whether Republicans opposing a Democratic President or Democrats opposing a Republican President—seldom have standing as voices of moderation. It is typically those who are most committed to opposition who suggest this tack while maintaining that it can be done in a collegial manner. The now long-running argument about who first de-railed a nomination of a well-qualified candidate and who did it to how many more or less is evidence of this problem.

Further, the effort to check nominees' views compromises the Senate's ability to check nominees' legal competence and temperament. Not only will the effort to check views take time and energy away from other screening; it also will color other screening efforts. Once ideology becomes the focus, any discussion will be seen through that lens. Objections to competence will be less likely to be credited as sincere. And that will further undermine the Senate's ability to focus clearly and cogently on that issue.

Perhaps most problematic, the process of publicly focusing on personal views will have adverse consequences for the legal system. It will convey to the public the false impression that ideology dominates judicial decision-making, which over time will undermine confidence in and respect for our legal system. That is not to anyone's advantage. Worse yet, the process also will induce judicial nominees to follow one of two routes, neither of which is attractive. One possible response is to duck—to avoid really saying anything about any issue. That almost surely will be seen as dissembling. The alternative is to try and have developed positions on the most important issues that might come before the nominee when on the bench. Of course, the nominee would then be making public statements about views on exactly the range of cases that are most politically sensitive—and that we most want judges to think hard about in the context of particular cases and arguments. We will be setting judges up either to make pronouncements they do not later follow or to make decisions in the wrong way about the issues we traditionally have entrusted to a case-by-case decision process that has served us well. These are bad alternatives. And they are the most likely alternatives. Grilling prospective judges about their views may look good at the time, but it has terrible effects on our legal system.

CONCLUSION

The Senate's advise-and-consent role with respect to federal judges is a weighty one. It should focus on assuring that our judges have the legal skills and the temperament necessary to the tasks of legal interpretation that we have entrusted to our judiciary. The Senate should not attempt to divine a nominee's personal views, positions on legal issues, or ideology. That is not likely to be a useful role for the Senate and is very apt to have untoward consequences for our judicial system.

I appreciate the opportunity to submit these remarks and would be happy to expand on any issue that interests the Committee.

Statement of Elena Ruth Sassower, Coordinator, Center for Judicial Accountability, Inc.

Dear Chairman Schumer:

As you know, the Center for Judicial Accountability, Inc. (CJA) is a national, nonpartisan, non-profit citizens' organization, based in New York. Our purpose is to safeguard the public interest in meaningful and effective processes of judicial selection and discipline. On the federal level, as likewise on state and local levels, these essential processes take place almost exclusively behind closed-doors. For your convenience, a copy of CJA's informational brochure is enclosed—similar to one I gave you, in hand, on March 20, 1998, when you were seeking election as a Senator from New York.

In the twelve years since our founding in 1989, CJA has had substantial first-had experience with the Senate Judiciary Committee under both Democratic and Republican chairmen. Reflecting this is the enclosed copy of CJA's May 27, 1996 letter to then Judiciary Committee Chairman Orrin Hatch, as printed in the record of the Committee's May 21, 1996 hearing on "The Role of the American Bar Association in the Judicial Selection Process" (Exhibit "A–1"). The subject of that hearing was whether the ABA should continue to occupy a privileged, semi-official role. This, because the ratings of the ABA's Standing Committee on Federal Judiciary were allegedly tainted by ideological considerations and by ABA "liberal" policy positions.

Inasmuch as CJA received no notice from the Senate Judiciary Committee of the June 26, 2001 hearing, "Should Ideology Matter?: Judicial Nominations 2001", held by the Subcommittee on Administrative Oversight and the Courts, which you now chair, I draw your attention to the final paragraph of CJA's May 27, 1996 letter to Chairman Hatch "A–I", p. 127):

> "Finally, we ask that this letter serve as CJA's standing to be placed on a 'notifications' list so that, in the future, we are immediately contacted when matters bearing specifically on judicial selection, discipline, and judicial performance are being considered by the Senate Judiciary Committee or any of its subcommittees." [1]

We did not learn of your June 26, 2001 Subcommittee hearing until June 25, 2001—and this, from a front-page item in the *New York Law Journal*, identifying it as "a hearing to debate the criteria senators should use when voting on President Bush's judicial nominees". I immediately called your office. After verifying that the hearing was focused on ideology, rather than more broadly on "criteria"—as to which CJA would have requested to testify—I advised that CJA would be submitting a statement for the record of the Subcommittee's hearing. Please consider this letter, including the annexed substantiating exhibits, as CJA's statement for inclusion in the printed record of the June 26th hearing.

In your Op-Ed article in the June 26th *The New York Times*, "Judging By Ideology"—as likewise in your prefatory statement at the June 26th hearing—you confess that Senators privately consider a nominee's ideology, but that because of the taboo surrounding its consideration, they conceal their ideological objections to nominees by finding "nonideological factors, like small financial improprieties from

[1] This identical request was made in a May 22, 1996 letter to Kolan Davis, then Chief Counsel to the Subcommittee on Administrative Oversight and the Courts—with copies sent to Winston Lett, the Subcommittee's then minority counsel, and John Yoo, then General Counsel to the full Committee and his then minority counterpart, Demetra Lambros (Exhibit "A–2"). Indeed, CJA's May 22, 1996 letter is largely identical to CJA's May 27, 1996 letter to Chairman Hatch, except that it does not particularize "CJA's more recent contacts with the ABA's Standing Committee on Federal Judiciary, this year and last. . . ."

long ago". You state, 'got-cha' politics has warped the confirmation process and harmed the Senate's reputation."

While CJA agrees with this assessment and applauds, as long overdue, you readiness to explore the ideological views of judicial nominees—many of whom were, and are presumably chosen by Presidents precisely for their ideological views—we must point out that there is a more fundamental reason why the confirmation process is "warped". It it "warped" because—except when the Senate Judiciary Committee is searching for some non-ideological "hook" on which to hang an ideologically-objectionable nominee—the Committee cares little, if at all, about scrutinizing the qualifications of the judicial nominees it is confirming. Indeed, the Committee willfully disregards incontrovertible proof of a nominee's unfitness, as likewise, of the gross deficiencies of the pre-nomination federal judicial screening process that produced him.

The Senate Judiciary Committee's failure to discharge its duty to investigate the qualifications of judicial nominees—notwithstanding its self-promoting pretense to the contrary—has been chronicled in the 1986 Common Cause study, *Assembly-Line Approval*—which made a list of salutary recommendations, most of which appear to be unimplemented today. Other studies, also with unimplemented salutary recommendations, have included the 1988 Report of the Twentieth Century Task Force on Judicial Selection, entitled *Judicial Roulette*, with a chapter entitled "*Senate confirmation: a Rubber Stamp?", as well as the 1975 book by Ralph Nader's Congress Project, The Judiciary Committees*, with a chapter entitled "Judicial Nominations: Whither 'Advice and Consent'?". These are important resources for the further hearings that your prefatory statement announced would be "examin[ing] in detail several other important issues related to the judicial nominating process".[2]

CJA's own direct, first-hand experience with the Senate Judiciary committee provides additional—and more recent—evidence of the Committee's outright contempt for its "advise and consent" constitutional responsibilities and for the public welfare. CJA's experience with the Committee is also unique in that it involves more than opposition to specific nominees. It involves meticulously-documented evidentiary presentations establishing critical deficiencies in the pre-nomination screening process, particularly relating to the American Bar Association. Specifically, CJA demonstrated, as to one federal District Court nominee, Westchester County Executive Andrew O'Rourke, appointed in 1991 by President George Bush, the gross inadequacy of the ABA's Standing Committee on Federal Judiciary's supposedly "thorough" investigation of his qualifications. As to another federal District Court nominee, New York State Supreme Court Lawrence Kahn, appointed in 1996 by President Bill Clinton, CJA showed that the ABA Standing Committee on Federal Judiciary had actually "screened out" information adverse to his fitness. In other words, CJA's contacts with the Senate Judiciary Committee have concerned not just judicial nominees, but a more transcending dimension of the adequacy and integrity of the judicial screening process, with particular focus on the ABA.

CJA regards it as a positive step that President George W. Bush has removed a wholly unworthy ABA from its preeminent, semi-official pre-nomination role in rating judicial candidates. Indeed, by letter to the President, dated March 21, 2001 (Exhibit "A–3"), CJA expressed support for such prospective decision, enclosing for his review a copy of our May 27, 1996 letter to Chairman Hatch (Exhibit "A–1") to illustrate the "good and sufficient reason" for removing the ABA from the pre-nomination screening process. Needless to say, inasmuch as the Senate Judiciary Committee—or at least the Democratic Senators—are now going to be utilizing the ABA to fulfill a post-nomination screening function, the readily verifiable evidence of the inadequacy and dishonesty of ABA investigations of judicial candidates—and of its dishonest refusal to in any way confront that evidence—are thresholds issues for the Committee in assessing whether, and under what circumstances, it can rely on ABA ratings.

We do not know the state of the Senate Judiciary Committee's record-keeping. However, we respectfully suggest that you make it a priority to find out what has become of the voluminous correspondence and documentary materials that the Committee received from CJA. Most voluminous is CJA's 50-page investigative Critique on the qualifications and judicial screening of Andrew O'Rourke, substantiated by

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[2] In particular, your upcoming, as yet unscheduled, two hearings on: "(1) The proper role of the Senate in the judicial process. What does the Constitution mean by 'advise and consent' and historically how assertive has the Senate's role been?", and "(2) What affirmative burdens should nominees bear in the confirmation process to qualify themselves for life-time judicial appointments? The Senate process is criticized for being a search for disqualifications. We should examine whether the burden should be shifted to the nominees to explain their qualifications and views to justify why they would be valuable additions to the bench."

a Compendium of over 60 documentary exhibits, which we initially presented to the Senate Judiciary Committee as our "Law Day" public service contribution in May 1992. As reflected by CJA's May 27, 1996 letter to Chairman Hatch (Exhibit "A–1"), we transmitted a duplicate copy of the Critique and Compendium to him under that letter, along with three Compendia of Correspondence relating thereto. The most voluminous of these, Compendium I, collected CJA's correspondence with the Senate Judiciary Committee and Senate leadership following presentment of CJA's Critique. Compendium II collected CJA's correspondence with the American Bar Association about the Critique—copies of which had been previously provided to the Senate Judiciary Committee.

CJA's May 27, 1996 letter (Exhibit "A–1", p. 125) highlights the evidentiary significance of the Critique in establishing

> "not the publicly-perceived partisan issue of whether the ratings of the ABA's Standing Committee on Federal Judiciary are contaminated by a 'liberal' agenda. Rather, . . . the issue that must concern all Americans: the gross deficiency of the ABA's judicial screening in failing to make proper threshold determinations of 'competence', 'integrity' and 'temperament'." (emphasis in the original)

Further described by our May 27, 1996 letter (Exhibit "A–1") is that, based on our Critique, CJA had called for a Senate moratorium on the confirmations of all judicial nominations pending official investigation of the deficiencies of the federal judicial screening process. Copies of our May 18, 1992 letter-request for the moratorium, addressed to the Senate Majority Leader George Mitchell (Exhibit "B–1"). Such letter-request, which we had sent to every member of the Senate Judiciary Committee, stated:

> "To the extent that the Senate Judiciary Committee relies on the accuracy and thoroughness of screening by the ABA and the Justice Department to report nominations out of Committee—with the Senate thereafter functioning as a 'rubber stamp' by confirming judicial nominees without Senate debate—a real and present danger to the public currently exists.
>
> It is not the philosophical or political views of the judicial nominees which are here at issue. Rather, the issue concerns whether present screening is making appropriate threshold determinations of fundamental judicial qualifications—i.e. competence, integrity, and temperament. Our critique of Andrew O'Rourke's nomination leaves no doubt that it is no." (emphases in the original)

Thereafter, on July 17, 1992, *The New York Times*, published our Letter to the Editor, which it entitled "Untrustworthy Ratings?", about our Critique's findings—and about our request for a moratorium "[b]ecause of the danger of Senate confirmation of unfit nominees to lifetime Federal judgeships (Exhibit "B–2").

The Senate Judiciary Committee's response to CJA's fact-specific, documented Critique was to refuse to discuss with us any aspect of our evidentiary findings—and to call police officers to have me arrested[3] when, after months of Committee inaction and foot dragging, ignoring my many attempts to arrange an appointment with counsel, I traveled down to Washington in September 1992 to discuss the serious issues presented by the Critique and by the ABA's refusal to take corrective steps—while, meantime, the Senate was proceeding with confirmations of federal judicial nominees.

Likewise, the Senate Judiciary Committee's response to CJA's May 27, 1996 letter (Exhibit "A–1")—copies of which CJA also sent to every member of the Committee—was to refuse to discuss the serious issues it presented with substantiating proof, to wit, "that the problem with the ABA goes beyond incompetent screening. The problem is that the ABA is knowingly and deliberately screening out information adverse to the judicial candidate whose qualifications it purports to review." Summarized by the May 27, 1996 letter (Exhibit "A–1", p. 126) were facts showing that the Second Circuit representative of the ABA's Standing Committee on Federal Judiciary had willfully failed to investigate case file evidence, transmitted by an October 31, 1995 letter (Exhibit "C"), of the on-the-bench misconduct of New York Supreme Court Justice Kahn,[4] then seeking appointment to the U.S. District Court for

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[3] See CJA's October 13, 1992 letter to then Senate Judiciary Committee Chairman Joseph Biden, annexed as Exhibit "Z" to CJA's Correspondence Compendium I.

ERR14[4] That Second Circuit representative to the ABA Standing Committee on Federal Judiciary, Patricia M. Hynes, has since become—and currently is—the Committee's Chairwoman. This because ABA "leadership;; has refused to address the evidence of Ms. Hynes misconduct in connection with her "investigation of Justice Kahn's qualifications.

the Northern District of New York, that the Chairwoman of the ABA's Standing Committee on Federal Judiciary was arrogantly disinterested in this willful failure to investigate—and that President Clinton subsequently appointed Justice Kahn to the U.S. District Court, presumably based on an ABA rating that Justice Kahn was "qualified".

CJA's May 27, 1996 letter expressly stated:

> "Based upon what is herein set forth, we expect you will want to afford us an opportunity to personally present the within documentary proof—which we would have presented at the [May 21, 1996] hearing on "The Role of the American Bar Association in the Judicial Selection Process"—as to how the ABA fails the public, which is utterly disserved and endangered by its behind-closed-doors role in the judicial screening process." (Exhibit "A–1", p. 127)

I daresay most people reading the May 27, 1996 letter would have had a similar expectation—and especially, if they had before them the substantiating documentary proof it transmitted. Conspicuously, the "Editor's Note", added to the end of the letter, as printed in the record of the Committee's May 21, 1996 hearing on the ABA's role, states: "Above mentioned materials were not available at press time." (Exhibit "A–1", p. 127). This is most strange as all those materials were express mailed to the Committee together with the "hard copy" of the letter.

The only response we received to our May 27, 1996 letter (Exhibit "A–1") was a June 13, 1996 acknowledgement from Senator Strom Thurmond (Exhibit "D–1"), whose form-letter text repeated, verbatim, the Senator's statement at the May 21, including that Congress has "adequate resources to properly investigate the background of individuals nominated to the federal judiciary" and that the Senate "carefully review[s]" these nominees, giving "due consideration to the ABA's Standing Committee on Federal Judiciary, prior to a vote on confirmation"

The only other response CJA received—a June 12, 1996 letter (Exhibit "F")—was, ostensibly, to CJA's April 26, 1996 letter to the Committee (Exhibit "E"), requesting to testify in opposition to Justice Kahn's confirmation, as well as answers to various procedural questions. One of these procedural questions, as highlighted in CJA's May 27, 1966 letter (Exhibit "A–1", pp. 126–7), concerned the change in Committee policy to preserve the confidentiality of ABA ratings of judicial nominees until the confirmation hearing.

By this June 12, 1996 letter, (Exhibit "F") Chairman Hatch denied, without explanation, CJA's written request to testify in opposition to Justice Kahn's Confirmation. Although confirming the Committee's "practice" of not publicly releasing the ABA ratings in advance of the confirmation hearing, Chairman Hatch did not identify how long such "practice" had been in effect and the reason therefor, which is what CJA expressly requested to know. He did however, admit, in response to another question in CJA's April 26, 1996 letter (Exhibit "E"), that "[T]he Judiciary Committee has no written guidelines in evaluating judicial nominees. Each candidate is reviewed on an individual basis by each Senator."

CJA responded with a June 18, 1996 letter (Exhibit "G–1"), requesting that Chairman Hatch explain his peremptory and precipitous denial of our request to testify and that he reconsider his denial based on facts therein set forth. We pointed out that he had not provided us with information as to "what the criterion is for presenting testimony at judicial confirmation hearings". Additionally, we pointed out that no one from the Committee had ever contacted us as to the basis of our opposition to Justice Kahn, which had not been identified by our April 26, 1996 letter (Exhibit "E"), and that although such identification did appear in CJA's May 27, 1996 letter (Exhibit "A–1", p. 126), to wit, that Justice Kahn as a New York Supreme Court Justice had

> "used his judicial office to advance himself politically. Specifically,. . .[he] had perverted elementary legal standards and falsified the factual record to 'dump' a public interest Election Law case which challenged the manipulation of judicial nominations in New York State by the two major political parties" (emphases in the original),

no one had ever requested that we furnish the Committee with a copy of the substantiating case file for review.

Chairman Hatch never responded to this June 18, 1996 letter (Exhibit "G–1"). Rather, on June 25, 1996 at 9:45 a.m., a Committee staffer telephoned us to advise that the Committee's confirmation hearing on Justice Kahn's nomination—whose date we had repeatedly sought to obtain from the Committee, without success—would take place at 2:00 p.m. that afternoon.

Such last-minute notice gave us just over four hours to get from Westchester, New York to Washington, D.C.—a logistical impossibility by surface transportation.

Throwing expense to the winds, we arranged with a car service to speed me to the airport for a noon flight. At the same time, we sought to clarify from the Committee whether, in making this expensive trip down to Washington, I would be permitted to testify. No clarification was forthcoming (Exhibit "G–2").

The June 25, 1996 Committee "hearing" on Justice Kahn's confirmation—which was held simultaneously with the "hearing" for four other District Court nominees, and immediately following the confirmation "hearing" for a nominee to the Circuit Court of Appeals—fits the description of the Committee staffer quoted in the 1986 Common Cause study, "Assembly Line Approval", who termed confirmation "hearings" "as pro forma as pro forma can be. Apart from Senator Jon Kyl, who was chairing the "hearing" in Chairman Hatch's absence, Only one other Committee member, Senator Paul Simon, was present for the boiler-plate questioning of the five District Court nominees, who were called up en masse to respond, seriatim, in "assembly-line" fashion, once the questioning of the nominee for the circuit Court of Appeals had been completed. Chairman Kyl then commended all the nominees as "exceptionally well qualified" and prepared to conclude the "hearing". This, without inquiring whether anyone in the audience had come to testify[5] and without identifying whether the Committee had received opposition to any of the nominees and its disposition thereof.

It was then that I rose from my seat. The transcript of the June 25, 1996 Senate Judiciary Committee "hearing" reflects the following colloquy between me and Chairman Kyl (Exhibit "H", pp. 790–791):

> *Sassower:* "Senator, there is citizen opposition to Judge Kahn's nomination"
> *Sen. Kyle:* "Let me just conclude the hearing, if we could."
> *Sassower:* "We request the opportunity to testify."
> *Sen. Kyle:* "The committee will be in order."
> *Sassower:* "We requested the opportunity 3 months ago, over 3 months ago[6]—"
> *Sen. Kyle:* "The committee will stand in recess until the police can restore order."
> [Recess]
> *Sen. Kyle:* "As the chair was announcing, we will keep the record open for 3 days for anyone who wishes to submit testimony, and that includes anyone in the audience, or questions from the members of the committee to the panel. Should you have any additional questions, of course you are welcome to discuss with staff any other questions you have concerning the procedure.
> The full committee will take up the full slate of nominations both for the circuit court and for the district court at the earliest opportunity. I cannot tell you exactly when, but I will certainly recommend that it be done at the earliest opportunity and I do not see any reason for delay.
> Senator Simon, do you have anything else that you wish to add?"
> *Sen. Simon:* "No. I think we have excellent nominees before us and I hope we can move expeditiously."[7]
> *Sen. Kyle:* "I certainly reflect that same point of view. Thank you again for being here. We thank everyone in the audience, and I again would say there are 3 days for anyone in the audience to submit and additional statements if you have them. Thank you. The committee stands adjourned."

It must be noted that in the "recess" noted by the transcript (Exhibit "H", p. 791), which was truly momentary, at least one police officer rushed to me and threatened that I would be removed if I said another word. This officer was one of about five other police officers who were waiting at the side of the room, summoned, I believe, by the Committee's Documents Clerk for the purpose of intimidating me. This, be-

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[5] By contrast, page 234 of the Judiciary Committees describes the Committee's April 21, 1971 hearing to confirm seven judicial nominees. Senator Roman Hruska was presiding. "Hruska asked if anyone in the room wished to speak on behalf of or against the nominee. The subcommittee the moved on to the next nominee." (emphasis added).

[6] Out of nervousness, I erred. April 19, 1996—the date I had contacted the Committee regarding CJA's request to testify in opposition—was not more than three months earlier. It was more than two months earlier.

[7] This statement by Senator Simon should be viewed not only in the context of the opposition to Justice Kahn and request to testify, which I articulated in his presence only moments earlier, but in the context of his counsel's representation to CJA in a October 8, 1992 letter, returning the copy of the Critique we had hand delivered to his Senate office. "While the [ABA] rating does carry weight, I can assure you that information provided by individuals who know the nominee, who have practiced before him or her, or otherwise have and interest and contact us is given every consideration." (emphases added) See Exhibits "U" and "Y" to CJA's Correspondence Compendium I.

cause I had refused to be intimidated by the Clerk's inexplicable surveillance of me, which included his shadowing me about the Senate Judiciary Committee's hearing room, from the time I walked in bullying me and gratuitously warning he was going to have me removed.

As the audience dispersed and Chairman Kyl approached the judicial nominees to congratulate them, I tried to speak with him about the serious nature of CJA's opposition to Justice Kahn. Chairman Kyl just waved me off: By then, the Committee's Documents Clerk was again at my side, threatening to have me removed for harassing the Committee. I told him then—as I had previously—that I had no desire to harass anyone, but simply wished to discuss CJA's opposition with the appropriate individuals. Indeed, I searched in vain for Committee counsel to speak with about CJA's opposition and request to testify. This included approaching the fifteen or so persons who had sat in the chairs behind those reserved for the Senators at the dais. None would identify themselves as counsel or staff with whom I could speak. Nor could I find any counsel with whom I could speak in the Committee's adjoining office. Meantime, the Committee's Document Clerk, with three police officers in tow, was again trailing and bullying me.

In the end, I obtained from the Documents Clerk the until-then-withheld ABA's rating for Justice Kahn, showing that, of all the judicial nominees up for confirmation, Justice Kahn had received the lowest ABA rating: a mixed rating with a majority voting him "qualified" and a minority voting him "not qualified". However, no sooner did I leave the Committee's office, indeed, in the corridor directly outside the Committee's door, I was arrested by Capitol Hill police on a completely trumped up charge of "disorderly conduct"—and hauled off to jail.

The shocking particulars of the orchestrated intimidation and abuse to which I was subjected at the Senate Judiciary Committee's June 25, 1996 "hearing" on Justice Kahn's confirmation are chronicled in CJA's June 28, 1996 letter to Chairman Hatch (Exhibit "I–1"), which was submitted for "the record".[8] This letter, additionally, recites the no less shocking fact that on June 27, 1996, the Committee, without waiting the announced three days for "the record" to be closed and written submissions received, voted to approve Justice Kahn's Confirmation.[9] Thus, CJA's June 28, 1998 letter begins:

> "This letter is submitted to vehemently protest the fraudulent manner in which the Senate Judiciary Committee confirms presidential appointments on the federal bench and its abusive treatment of civic-minded representatives of the public who, without benefit of public funding give their services freely so as to assist the Committee in performing its duty to protect the public from unfit judicial nominees.
>
> This letter is further submitted in support of [CJA's] request for immediate reconsideration and reversal of the Committee's illegal vote yesterday, approving confirmation of Justice Lawrence Kahn's nomination as a district court judge for the Northern District of New York. . .such Committee vote was taken prior to the expiration of the announced deadline for closure of the record and without any investigation by the Senate Judiciary Committee into available documentary evidence of Justice Kahn's politically-motivated, on-the-bench misconduct as a New York state court judge, for which he has been rewarded by his political patrons with a nomination for a federal judgeship.

Because this Committee has deliberately refused to undertake essential post-nomination investigation, even where the evidence before it shows that appropriate pre-nomination investigation was not conducted, this letter is also submitted in support of [CJA's] request for an official inquiry by an independent commission to determine whether, when it comes to judicial confirmations, the Senate Judiciary Committee is anything more than a facade for behind-the-scenes political deal-making. In the interim, [CJA] reiterates its request for a moratorium on all Senate confirmation of judicial nominations. Such moratorium was first requested more than four years ago by letter dated May 18, 1992 to former Majority Leader George Mitchell []. Copies of that letter were sent to every member of the Senate Judiciary Committee—including yourself." (emphases in the original)

Once again, as with CJA's May 18, 1992 moratorium -request (Exhibit "B–1") and CJA's May 27, 1996 letter to Chairman Hatch (Exhibit "A–1"), CJA sent copies of

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[8] CJA's June 28, 1996 letter is printed in the record of the Committee's June 25, 1996 "hearing" on Justice Kahn's confirmation (at pp. 1063–1074), but nit with its annexed exhibits. According to the "Editor's note" appearing at the end of the letter, "Exhibits A through I are retained in the Committee files" at p.1074).

[9] See Exhibit "J–7", p. containing a summary of the minutes of the Committee's June 27, 1996 meeting pertaining to the judicial nominees.

the June 28, 1996 letter (Exhibit "I-1") to every member of the Senate Judiciary Committee. Additionally, copies were sent, both my mail and fax,[10] to then Senate Majority Leader Trent Lott and then Senate Minority Leader Thomas Daschle (Exhibit "I–2").[11]

Within the next days, CJA unexpectedly received information further underscoring the Committee's profound dysfunction and bad-faith. This information was from two New York citizens active in the fight for good government and constitutional reform, Bill Van Allen and Faye Rabenda. They advised me that on June 7, 1996—which was just five days before Chairman Hatch's June 12, 1996 letter denying CJA's request to testify (Exhibit "F")—they had made a trip to Washington to apprise the Committee of their strong opposition to Justice Kahn's confirmation. This, based on his politically-motivated decision-making in a public interest case involving local corruption in Duchess County. Although such opposition, coming from individuals who were separate and unrelated to CJA, should have had the effect of reinforcing CJA's opposition, likewise based on Justice Kahn's politically-motivated decision-making in a public interest case, also involving corruption, the Committee did not react accordingly. Instead, just as the counsel for the Committee had never interviewed CJA and requested from us the substantiating case file evidence, so likewise, they had not interviewed these individual citizens and requested their substantiating case file evidence. Indeed, the Committee did not even notify Mr. Van Allen and Ms. Rabenda of the June 25, 1996 "hearing" on Justice Kahn's confirmation or invite them to submit written opposition.

As a result of this unexpected information, which I learned of on or about Friday, July 12th, I telephoned the Senate leadership on Monday morning July 15th. It was then that I learned from the office of then Senate Majority Leader Lott that an "agreement had been reached" between Republicans and Democrats for Senate confirmation the next day of judicial nominees—Justice Kahn, among them. This is reflected by fax CJA's July 15, 1996 memo to counsel to the Senate Judiciary Committee (Exhibit "J–1"), faxed to the Committee's office and the offices of the Senate Majority and Minority Leaders (Exhibits "J–2", "J–3"), as well as by CJA's July 15, 1996 letter to Senator Herbert Kohl, a Committee member, (Exhibit "J–4")—copies of which were faxed to the Senate Judiciary Committee and Senate Majority and Minority Leaders. Evident from CJA's July 15, 1996 letter to Senator Kohl is that no counsel at the Senate Judiciary Committee had seen fit to speak with me—and that I could not even obtain confirmation that, as requested by our memo-fax to counsel (Exhibit "J–1"), the evidentiary materials we had transmitted under our May 27, 1996 letter (Exhibit "A–1") would be immediately transmitted to the Majority Leader's office:

> "We do not know the status of our transmittal inasmuch as the Senate Judiciary Committee receptionists have refused to even verify that our fax has been given to its counsel—whose identity I was told is 'confidential'— and have refused to confirm that the materials will, as requested, be transmitted [to the Majority Leader's Office. . ."

CJA also phoned Mr. Van Allen and Ms. Rabenda, who then contacted the Committee, by phone and in writing (Exhibit "K"), requesting that it provide the Senate Majority Leader with any "documentation created by the Senate Judiciary Committee staff relating to [their] strong opposition" to Justice Kahn's confirmation, including relating to their June 7th visit to the Committee when they "spoke for approximately 5–10 minutes with a "staff member".

The upshot of CJA's vigorous efforts to prevent the Senate rubber-stamp confirmation of Justice Kahn's nomination, including a great many long distance phone calls, only partially reflected by the annexed phone bill (Exhibit "J–6"),[12] was that, upon information and belief, that nomination, as well as the others, were approved by the usual undebated vote on July 16, 1996 in Executive Session (Exhibit "L").

The flagrant misfeasance of the Senate Judiciary Committee and Senate leadership, chronicled by the annexed exhibits and further established by the voluminous correspondence and other materials that should be stored somewhere in the Senate Judiciary Committee, serves no purpose but to enable Senators to continue to

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[10] The July 1, 1996 fax cover sheets to CJA's June 28, 1996 letter read "Formal Request for Senate moratorium on all judicial confirmations and, in particular, opposition to confirmation of Lawrence Kahn (for N. District—NY)."

[11] Although CJA never got around to sending a copy of the June 28, 1996 letter to its first indicated recipient, President Bill Clinton (Exhibit "I–1", p. 12), we would certainly be pleased if Senator Hillary Clinton, and indicated recipient of this letter, shared it with the former President.

[12] I made contemporaneous notes of some of my July 15–16, 1996 phone conversations. These are retyped and annexed as Exhibit "J–7".

"wheel and deal" judicial nominations, cavalierly using them for patronage or for trading with their congressional colleagues and the President for other valuable consideration or promises thereof.

Obviously, a Senate Judiciary Committee which so shamelessly spurns the evidence-based presentations of a non-partisan, non-profit citizens' organization, whose advocacy meets the highest standards of professionalism, is not treating with greater respect and decency the average citizen who comes forward to oppose confirmation of individual judicial nominees. This certainly is reflected in the way the Committee treated good government activists Bill Van Allen and Faye Rabenda (Exhibit "K"), whose opposition to Justice Kahn should have been viewed as reinforcing CJA's own.

Hopefully, with your chairmanship of the Subcommittee on Administrative Oversight and the Courts—and your vision of this and the upcoming three hearings "at least" as an "important dialogue" on the Senate's role in judicial nominations—essential reforms will be made in how the Senate Judiciary Committee—and the Senate—discharges its "advise and consent" function. Certainly, the absolute necessity that the Committee and Senate scrutinize the competence, integrity, and temperament of judicial nominees is reinforced by the fact that the mechanisms for disciplining and removing incompetent, dishonest, and abusive federal judges from the bench are verifiably sham and dysfunctional.

On this vital subject, I would note that when I handed you a copy of CJA's informational brochure on March 20, 1998—following your lecture at Ansche Chesed Synagogue on New York's Upper West Side—I also gave you a copy of CJA's published article, "Without Merit: The Empty Promise of Judicial Discipline" (The Long Term View, Massachusetts School of Law, Vol. 4, No. 1 (Summer 1997)). It exposes the facade that passes for the federal judicial complaint mechanism under 28 U.S.C. § 372(c) and the House Judiciary Committee's non-existent capacity and willingness to investigate judicial impeachment complaints (Exhibit "M–1"). A copy of this important article had been sent to the House Judiciary Committee—of which you were a member—under a March 10, 1998 memorandum addressed to the House Judiciary Committee's Chairman and members, a copy of which I also handed you (Exhibit "M–2").

In the event you harbor the unwarranted belief that the House Judiciary Committee is any different from the Senate Judiciary Committee in its flagrant disrespect for fully-documented presentations, enclosed is CJA's statement for the record of the House Judiciary Committee's June 11, 1998 "Oversight Hearing of the Administration and Operation of the Federal Judiciary", held by the Courts Subcommittee (Exhibit "N–1"). Its opening sentence expressly identifies that it is presented

> "so that members of Congress and the interested public are not otherwise misled into believing that the House Judiciary Committee or its Subcommittee is meaningfully discharging its duty to oversee the federal judiciary. It is not."

Described therein is the refusal of the House Judiciary Committee to respond to CJA's March 10, 1998 memorandum (Exhibit "M–2/M–1"), as well as CJA's March 23, 1998 memorandum, which transmitted to the House Judiciary Committee readily-verifiable proof that the mechanisms for ensuring the impartiality of federal judges and, where necessary, for disciplining and removing, them have been reduced to "empty shells". This, in addition to describing the refusal of the Courts Subcommittee to permit CJA to testify at its June 11, 1998 "oversight hearing"—where the only witnesses allowed to testify were representatives of the judiciary. The House Judiciary Committee's response to this written statement was to exclude it from the printed record of its June 11, 1998 "oversight hearing"—which it did wholly without notice to CJA (Exhibit "N–2").

Since your Subcommittee on Administrative Oversight and the Courts, assumedly, has concurrent jurisdiction with the House Courts Subcommittee, CJA respectfully requests that while you are clarifying with the Senate Judiciary Committee as to the whereabouts of CJA's 1992 Critique and voluminous correspondence, you also clarify with the Courts Subcommittee of the House Judiciary Committee as to the whereabouts of CJA's voluminous document-supported correspondence, establishing that the federal judiciary has gutted the federal statutes relating to judicial discipline and refusal, and that the House Judiciary Committee has abandoned its oversight over federal judicial discipline, including its impeachment responsibilities. Needless to say, if these Committees are unable to locate this important documentation, CJA will furnish you with duplicate copies.

We look forward to testifying at upcoming hearings of your Subcommittee—which should be on issues of both federal judicial selection and federal judicial discipline.

As the situation currently exists, with the Senate Judiciary Committee willfully disregarding its duties to scrutinize qualifications of judicial nominees and the House Judiciary Committee willfully disregarding evidence of serious judicial misconduct, the lives and liberties of this nation's citizens are at the mercy of judges who should not be on the bench in the first place and who grossly abuse their judicial powers without the slightest fear of discipline, let alone removal.

We welcome your able leadership. Ensuring that the public is protected by properly functioning processes of federal judicial selection and discipline should be a top priority.

Statement of Hon. Charles E. Grassley, a U.S. Senator from the State of Iowa

Today, the Subcommittee will hear witnesses discuss whether ideology matters in the judicial selection process. Let me briefly state some of my thoughts on this issue.

Our Constitution gives the President the sole power to nominate judges. But the Constitution provides the United States Senate with the role of "advise and consent." And whether a nominee comes from a Democratic or Republican President, I've consistently applied the same criteria in my determination to vote against or to confirm a nominee: does that individual have the requisite intellect, knowledge, integrity, judicial temperament, and philosophy to serve on the federal bench?

These individuals need to have demonstrated that they will follow the law—that is, the text and intent of the Constitution and the statutes ratified and enacted by the people. They need to have a healthy respect for case precedent. And above all, they need to clearly understand their role in the third branch of government: interpreting the law, rather than creating the law.

In addition to being faithful to the Constitution, judicial nominees must be impartial and appear impartial. Judges must impartially decide the cases that come before them. I've asked this question before: if a nominee tells Congress how he or she will decide particular cases, how can litigants who appear before the nominee as a judge be confident that the judge will be impartial?

I believe that Senators can ask certain general questions to prospective nominees: how they generally approach constitutional adjudication and statutory construction, the role of case precedent, and other similar issues. But using a political ideology litmus test is mentally at odds with the Senate's role in the confirmation process and certainly it violates the fundamental idea of separation of powers. Such a test will lead to a politicizing of the independent judiciary. Rather, the Framers envisioned Senate confirmation as a tool for weighing the qualifications—not the ideology—of a candidate.

I also want to note that as the Chairman of the Administrative Oversight and the Courts Subcommittee in this last Congress, I examined the appropriate allocation of judgeships and the prospect of growth in the federal judiciary. I've come to the conclusion that Congress should expend funds to fill an existing vacancy or to create a new judgeship only after a comprehensive determination has been made that such actions are absolutely essential for the court to properly administer justice.

I look forward to the witnesses' testimony.

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Thomas L. Jipping, M.A., J.D.
Director

John A. Nowacki, Esq.
Deputy Director

June 25 2001

The Hon. Jeff Sessions
513 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Sessions:

We represent millions of Americans deeply concerned about an activist federal judiciary. Judicial activism threatens self-government; without self-government, there is no liberty. In America, lawmakers must be accountable to the people, yet unaccountable judges with life tenure too often assume that role by making our laws mean something other than what the real lawmakers intended.

Some of us lobby, others educate. We have different methods, different means, but one message. We will promote judicial restraint and fight judicial activism with whatever tools and resources are legitimately at our disposal. The Constitution names the President and the Senate as the key players in judicial selection, but both are accountable to the people.

We join in expressing our common resolve and commitment to see a more restrained judiciary, one more consistent with self-government and liberty.

Sincerely,

[signatories follow]

"High Noon" - NBC Radio
"Hot Talk" KCNN
"Insight" Live w/ Faye Hardin
"Jay Sekulow Show"
"John Hagee"
"Monday Night Live" WAFG, Ft. Lauderdale, FL
"Radio Liberty"
"Texas Journal"
"The Bottom Line"
"The Don Kroah Show"
"The Right at Night", WGNU 920 AM
"Your Business" with Sam Bushman
Accuracy in Media
Aid & Abet Police/Military Newsletter
Alabama Citizens for Life
Alabama Citizens For Truth
Alabama Family Alliance
Alaska Right to Life
Alaska Term Limit Coalition
Alleghany Institute
Alliance Defense Fund
Alliance For America
Alpha Center (SD)
American Assoc. of Pro-life OBGYNS
American Association For Small Property Ownership
American Association of Christian Schools
American Cause, The
American Center For Law and Justice
American Center for Law and Justice (National)
American Center for Legislative Reform
American Civil Rights Organization
American Coalition of Life Activists
American Collegians for Life
American Conservative Media Network (The)
American Conservative Newspaper (IA)
American Conservative Union
American Conservative Union of Iowa
American Conservative, The
American Constitution Party
American Constitutional Law Foundation
American Council on Economic Security
American Decency Association
American Defense Institute
American Education Reform Foundation
American Family Association
American Family Association of Alabama
American Family Association of Alaska
American Family Association of Arkansas
American Family Association of California
American Family Association of Colorado
American Family Association of Georgia
American Family Association of Indiana
American Family Association of Iowa
American Family Association of Kentucky
American Family Association of Michigan
American Family Association of Mississippi
American Family Association of Missouri
American Family Association of New Jersey
American Family Association of New York
American Family Association of Ohio
American Family Association of Oregon
American Family Association of Pennsylvania
American Family Association of Texas
American Family Association of Virginia
American Family Defense Coalition (CA)
American Focus
American Foundation (OH)
American Freedom Crusade
American Freedom Institute

American Heritage Party
American Immigration Control
American Land Rights Association
American League of Catholic Voters
American Legislative Exchange Council
American Life League
American Loggers Solidarity
American Monetary Foundation
American National Council for Immigration Reform
American Nationalist Union
American Policy Center
American Pro-Constitutional Association
American Public Philosophy Institute
American Reformation Project
American Renewal
American Right to Life
American Rights Coalition
American Sovereignty Action Project
American Studies Center
Americanism Foundation
Americans Against Discrimination & Preferences
Americans Back in Charge Foundation
Americans for a Sound AIDS/HIV Policy
Americans for Choice in Education
Americans for Decency
Americans for Family Values
Americans for Lawful Government
Americans for Limited Terms
Americans for Sound Public Policy
Americans for Tax Reform
Americans for Tax Reform (OH)
Americans for Voluntary School Prayer
Americans United for Life
America's Future Foundation
Arizona Christian Coalition
Arizona Conservative Union
Arizona Eagle Forum
Arizona Right to Life
Arizonans for an Empowered Future
Arkansas Family Council
Arkansas Federation of Young Republicans
Arkansas Policy Foundation
Arkansas Rifle & Pistol Association
Armstrong Foundation (The)
Association of American Educators
Association of American Surgeons & Physicians
Association of Christian Schools International
Association of Concerned Taxpayers
Association of New Jersey Rifle and Pistol Clubs
Association of State Policy Council
Bellwether Ministries
Black Californians for Life
Blackstone Institute
Blueprint
Brassroots
Bristol Group (The)
California Bowman Hunters & State Archery Assoc.
California Coalition for Immigration Reform
California Justice Foundation
California Public Policy Foundation
California Republican Assembly
California Right to Life Committee
Californians For America
Californians for Family Values
Campaign for California Families
Campaign for Working Families
Capital Research Center
Capitol Hill Prayer Alert
Capitol Resource Institute
Carolina Family Alliance
Cascade Policy Institute
Castlebrook Counseling, Inc.
Catena Rose Victims of Crime Assistance League
Catholic Alliance
Catholic Campaign for America
Catholic Defense League
Catholic League for Religious and Civil Rights

Catholic Vote. Org
Center for a New Black Leadership
Center for Bio-Ethical Reform
Center for Educational Advancement
Center for Equal Opportunity
Center for Faith & Freedom, Inc.
Center for Individual Rights
Center for Military Readiness
Center for Reclaiming America
Center for the Defense of Free Enterprise
Center for the New West
Center of the American Founding
Chalcedon
CHEK: Christian Home Educators of Kentucky
Christian Action League of North Carolina
Christian Action Network
Christian Alert Network (The) (TCAN)
Christian Coalition
Christian Coalition of Alabama
Christian Coalition of Alaska
Christian Coalition of Arkansas
Christian Coalition of California
Christian Coalition of Florida
Christian Coalition of Georgia
Christian Coalition of Hawaii
Christian Coalition of Indiana
Christian Coalition of Iowa
Christian Coalition of Kansas
Christian Coalition of Kentucky
Christian Coalition of Louisiana
Christian Coalition of Maine
Christian Coalition of Massachusetts
Christian Coalition of Montana
Christian Coalition of New Hampshire
Christian Coalition of New Jersey
Christian Coalition of New Mexico
Christian Coalition of New York
Christian Coalition of North Carolina
Christian Coalition of Ohio
Christian Coalition of Pennsylvania
Christian Coalition of Rhode Island
Christian Coalition of Washington
Christian Coalition of Wyoming
Christian Educators Association, International
Christian Exchange, Inc.
Christian Home Educators of New Hampshire
Christian Law Association
Christian Legal Defense
Christian Libertarian Fellowship
Christian Schools of Vermont
Christian Values in Action Coalition, Inc.
Citizen Soldier
Citizens Against Violent Crime
Citizens Against Repressive Zoning
Citizens Committee for the Right to Keep and Bear Arms
Citizens Equal Rights Alliance
Citizens for a Sound Economy
Citizens for Action Now
Citizens for Better Government
Citizens for Budget Reform
Citizens for Community Values
Citizens for Constitutional Property Rights
Citizens for Economically Responsible Government
Citizens for Educational Freedom
Citizens for Excellence in Education
Citizens for Excellence in Education (TX)
Citizens for Federal Judicial Term Limits
Citizens for God & Country
Citizens for Judicial Responsibility
Citizens for Law and Order
Citizens for Less Government
Citizens for Reform
Citizens for Representative Government
Citizens for Responsible Government
Citizens for Tax Reform (NJ)
Citizens for the Protection of Children
Citizens' Justice Programs
Citizens United
Claremont Institute Center for Constitutional Jurisprudence

Coalition Against Pornography
Coalition for Constitutional Liberties
Coalition for Local Sovereignty
Coalition of Arizona/New Mexico
Counties for Stable Economic Growth
Coalition of New York Taxpayers
Coalitions for America
Collegians Activated to Liberate Life
Colorado Association of Christian Schools
Colorado Coalition for Fair Competition
Colorado for Family Values
Colorado Right to Life
Colorado Term Limits Coalition
Colorado Union of Taxpayers
Committee for a Constructive Tomorrow
Committee for a Republican Future
Commonwealth Foundation
Communities for a Great Northwest
Compass, The
Concerned Citizens of Florida
Concerned Citizens Opposed to Police States
Concerned Taxpayers of Mississippi
Concerned Women For America
Concerned Women for America (VA)
Connecticut Association of Christian Schools
Connecticut Christian Coalition
Connecticut Eagle Forum
Connecticut State Rifle & Revolver Association
Conservative Alert!
Conservative America
Conservative Campaign Fund
Conservative Leadership PAC
Conservative Opportunity Society PAC
Conservative Victory Committee
Conservative Victory Fund
Constitution Party of Idaho
Constitution Party of Texas
Constitutional Government Council
Constitutional Heritage Institute
Constitutional Party of Pennsylvania
Constitutionists Networking Center
Coral Ridge Ministries
Coral Ridge Ministries Media, Inc
Cornerstone Fellowship
Cornerstone Policy Research
Council of Conservative Citizens
Crime Victims United
Crooked Lake North Shore Association
Crossover Ministries
Culture of Life Foundation
Cutting Edge
Day Star Tribune
Defenders of Property Rights
Delaware Christian Coalition
Delaware Family Foundation
Delaware Home Education Association
Delaware State Sportsman's Association
Dentists for Life
Direct Legislation League
Dominion Foundation (The)
Douglas Policy Institute
E.M.B.R.A.C.E.
Eagle Forum
Eagle Forum of Alabama
Eagle Forum of Arkansas
Eagle Forum of California
Eagle Forum of Colorado
Eagle Forum of Delaware
Eagle Forum of Georgia
Eagle Forum of Hawaii
Eagle Forum of Idaho (Idaho Citizens for Quality Education)
Eagle Forum of Illinois
Eagle Forum of Indiana
Eagle Forum of Louisiana
Eagle Forum of Massachusetts
Eagle Forum of Michigan
Eagle Forum of Minnesota
Eagle Forum of Mississippi
Eagle Forum of North Carolina
Eagle Forum of Ohio
Eagle Forum of Rhode Island
Eagle Forum of South Carolina
Eagle Forum of Virginia
Eagle Forum of Washington
Eagle Forum of Washington, D.C.

Eagle Forum of Wisconsin
Education Excellence Coalition
Educational Forum
Empower America
English First
Enough is Enough
Enter Stage Right
Environmental Conservation Organization
Environmental Policy Task Force
Ethan Allen Institute
Ethics and Religious Liberty Commission
Evergreen Freedom Foundation
Exeter Taxpayers Association
Family First of Colorado
Family First of Florida
Family First of Nebraska
Family Foundation (KY) (The)
Family Foundation (VA) (The)
Family Friendly Libraries
Family Institute (TN)
Family Institute of Connecticut
Family Life Seminars
Family of the Americas Foundation
Family Policy Network
Family Protection Lobby
Family Research Council
Family Research Institute of WI
Family Taxpayers Foundation
Family Taxpayer's Network (IL)
First American Constitutional Committee
First Breath Alliance
First Principles, Inc.
Florida Eagle Forum, Inc.
Florida Right to Life
Florida Sport Shooting Association
Focus on the Family
Free Market Foundation
Freedom Alliance
Freedom Foundation (The) (MO)
Freedom in Medicine Foundation
Freedom Law School
Frontiers of Freedom
Fully Informed Jury Association
Garden State Association of Christian Schools
Georgia Association of Christian Schools
Georgia Family Council
Georgia Family Education and Research Council
Georgia Public Policy Foundation
Georgia Sports Shooting Association
God Bless America
Goldwater Institute
Good Counsel
Government Is Not God PAC
Granite State Taxpayers
Great Lakes Center for Law and Justice
Greater Boston Young Republicans
Greenfield Movement to Impeach Federal Judge John T. Nixon
Guardians of Education for Maine
Gulf Coast American Family Association
Gun Owners Action League, Inc
Gun Owners of America
Gun Owners of California
Gun Owners of New Hampshire
Gun Owners of South Carolina
Gun Owners of Utah
Hawaii Republican Assembly
Hawaii Rifle Association
Help America
Heritage Caucus/ Judicial Forum
Home Education RADIO Network
Home School Legal Defense Association
Howard Center
Human Life Alliance of MN., Inc
Human Life International
Idaho Christian Coalition
Idaho Family Forum
Illinois Association of Christian Schools
Illinois Christian Coalition
Illinois Citizens for a Sound Economy
Illinois Citizens for Life
Illinois Family Institute
Illinois Right to Life Committee

Illinois State Rifle Association
In Magazine
Independence Institute
Independent American Party of Nevada
Independent Women's Forum
Indiana Citizens for Life
Indiana Conservative Union
Indiana Family Institute
Indiana Policy Review Foundation
Indiana Republican Liberty Caucus
Individual Rights Foundation (Center for Pop Cult.)
Information Radio Network
Initiative & Referendum Institute
Institute for Constitutional Thought
Institute for Family Studies
Institute for Media Education (The)
Institute on Religion & Democracy
Institute on Religion and Public Life
Iowa Chapter of American Association of Christian Schools
Iowa Family Policy Center
Iowa Right to Life Committee
James Madison Institute for Public Policy Studies
Jewish Policy Center (The)
John Hagee Ministries
John Locke Foundation
Judicial Reform Act (of California) (The)
Judicial Reform Foundation
Judicial Selection Monitoring Project
Judicial Studies and Policy Group (The)
Judicial Watch of California
Judicial Watch, Inc.
Justice Fellowship
Justice for Homicide Victims
Justice for Murder Victims
Justice Times Journal
Kansans for Life
Kansas Association of Christian Schools
Kansas Conservative Union
Kansas Eagle Forum
Kansas Family Research Institute
Kansas Taxpayers Network
KATB Radio, Anchorage AK
KBRT
KBRT (Costa Mesa, CA)
KCS FM 102 (Colorado Springs)
KDOV 91.7 FM (Medford, OR)
KDXU-AM "Perspectives Talk Radio"
Kentucky Family Forum
Kentucky Right to Life Association, Inc
Kerusso Ministries
KFLR (Phoenix)
KFLT - Family Life Radio (Tucson, AZ)
K-LIGHT's "Time Well Spent," KYTT-FM
KNUS (Denver)
KPRZ San Diego
Krieble Institute -- USA
KSDO AM 1130 (San Diego)
Land Rights Foundation
Landmark Legal Foundation
Law Enforcement Alliance of America
Lawyer's Second Amendment Society, Inc.
League of American Families
League of Catholic Voters
League of Private Property Voters
Legal Affairs Council
Libertarian Party of Ohio
Libertarian Party of South Dakota
Libertarian Party of Utah
Liberty Amendment Foundation
Liberty Counsel
Liberty Matters
Liberty's Educational Advocacy Forum
Life Advocacy Alliance
Life Coalition International
Life Decisions International
Life Issues Institute, Inc.
Life Legal Defense Foundation
Lifesavers
Lincoln Caucus
Lincoln Institute for Research & Education
Lincoln Legal Foundation
Local Government Council
Louisiana Citizens for a Sound Economy

Louisiana Family Forum
Louisianians for Tax Reform
Mackinac Center for Public Policy
Madison Project (The)
Maine Right to Life Committee
Maine Tax Watch
Maryland Assoc. of Christian Schools
Maryland Christian Coalition
Maryland Conservative Caucus
Maryland Constitution Party
Maryland Constitution Party
Massachusetts Association of Christian Schools
Massachusetts Citizens for Life
Massachusetts Family Institute
Memory of Victims Everywhere
Michigan Association of Christian Schools
Michigan Christian Coalition
Michigan Decency Action Council
Michigan Family Forum
Michigan Term Limits Coalition
Minnesota Christian Coalition
Minnesota Family Council
Minnesota Landowners Rights Association
Minnesota Rifle and Revolver Association
Mississippi American Family Association
Mississippi Christian Coalition
Mississippi Family Council
Missouri Association of Christian Schools
Missouri Association of Teaching Christian Homes
Missouri Christian Coalition
Missouri Eagle Forum
Missouri Family Policy Center
Missouri Right to Life
Montana State Eagle Forum
Montanans for Term Limits
Morality Action Committee
Morality in Media, Inc.
More Edwards Witherspoon Institute
Mother's Arms
National Abstinence Clearing House
National Association for Neighborhood Schools
National Association of Christian Educators
National Association of Evangelicals
National Association of Industrial & Office Properties
National Association of Reversionary Property Owners
National Bar Association
National Center for Constitutional Studies
National Center for Home Education
National Center for Public Policy Research
National Citizens Legal Network
National Clergy Council, The
National Coalition for Protection of Children & Families
National Coalition for Restoration of the Black Family
National Defense Council Foundation
National Education Taskforce, Inc.
National Family Legal Foundation
National Federation of American Hungarians
National Federation of Republican Assemblies
National Institute of Family & Life Advocates
National Justice Foundation
National Law Center for Children & Families
National Legal and Policy Center
National Legal Foundation (The)
National Parents' Commission
National Retail Sales Tax Alliance
National Rifle Association
National Right to Work Committee
National Tax Limitation Committee
National Taxpayers Union
National Taxpayers United of Illinois
National Wilderness Institute

Nebraska Christian Coalition
Nebraska Civic Digest
Nebraska Republican Assembly
Nebraska State Rifle & Pistol Association
Neon Communications
Nevada Christian Coalition
Nevada Concerned Citizens
Nevada Eagle Forum
Nevada Policy Research Institute
Nevada State Rifle & Pistol Assoc.
New Hampshire Center for Constitutional Studies
New Hampshire Landowners Alliance
New Hampshire Right to Life
New Jersey Eagle Forum
New Jersey Family Policy Council
New Mexico Shooting Sports Association
New York Eagle Forum
New Yorkers Family Research Foundation
New Yorkers for Constitutional Freedoms
North Carolina Christian School Association
North Carolina Family Policy Council
North Carolina Taxpayers United
North Central FL Sportsmen's Assoc.
North Dakota Christian Coalition
North Dakota Family Alliance
North Dakotans for Term Limits
Northern Virginia Republican PAC
Northwest Chapter of American Association of Christian Schools
Northwest Council of Governments
Northwest Legal Foundation
Of the People
Ohio Citizens for Educational Freedom
Ohio Conservative Alliance
Ohio Right to Life Society
Oklahoma Christian Coalition
Oklahoma Citizens for a Sound Economy
Oklahoma Conservative Committee
Oklahoma Council of Public Affairs, Inc
Oklahoma Eagle Forum
Oklahoma Family Policy Council
Oklahoma Rifle Association
Oklahoma Term Limits
Oklahomans for Children & Families
Old Dominion Association of Church Schools
One Nation Indivisible
Online Democracy
Operation Integrity
Operation Rescue
Oregon Center for Family Policy
Oregon Christian Coalition
Oregon Firearms Federation
Oregon Lands Coalition
Oregon Republican Assembly
Oregon Right to Life
Oregon Taxpayers United
Oregon Women for Agriculture
Oregonians In Action Legal Center
Organized Victims of Violent Crime
Pacific Research Institute for Public Policy
Palmetto Family Council
Parents Rights Coalition of Massachusetts
Peaceable Texans for Firearm Rights
Pennsylvania Family Institute
Pennsylvania Landowners' Association, Inc
Pennsylvania Rifle & Pistol Association
Pennsylvanians For Human Life
People Advancing Christian Education
People for the West!
Please Let Me Live
Plymouth Rock Foundation
Political Economy Research Institute
Population Research Institute
Priests for Life
Pro-Family Legislative Network
Progress & Freedom Foundation
Project 21
Project Reality
Pro-Life Action League

Pro-Life America
Pro-Life Office Educational Fund
Pro-Life Ohio
Pro-Life Resources
Property Rights Foundation of America
Protective Parents Research Network
Providence Foundation
Pro-Vita Advisors
Public Advocate
Public Interest Institute
Pure Life Ministries of Cleveland
Putting Liberty First
Radio America Network
Reason Foundation
Regain American Heritage Foundation
Regent University Federalist Society
Religious Freedom Coalition
Religious Heritage of America Foundation
Religious Roundtable
Republican National Coalition for Life
Resource Education Network
Rhode Island State Right to Life Committee, Inc.
Right to Life of Greater Cincinnati, Inc.
Right to Life of Idaho
Rocky Mountain Family Council
Rocky Mountain Gun Owners
Round-Up Republican Women's Club
Safe Streets Alliance
Salem Sentinel
Sanctuary Ministry
Save America's Youth
Second Amendment Foundation
Second Amendment Sisters
Seniors Coalition
Sixty (60) Plus Association
Small Business Survival Committee
Small Business Survival Committee of Arizona
Smith Center
South Carolina Association of Christian Schools
South Carolina Christian Coalition
South Carolina Policy Education Foundation
South Carolina Republican Assembly
South Dakota Christian Coalition
South Dakota Family Policy Council
South Dakota Right to Life
South Dakota Shooting Sports Association
South Florida Firearms Owners
Southeastern Legal Foundation
Southern CT Christian Network
Southwest Florida Sportsman's Association
Stewards of the Range
Stop Promoting Homosexuality America
Strategic Policies Institute, The
Strike Back
Students for America
Susan B. Anthony List (The)
Sutherland Institute (The)
Take Back Arkansas, Inc.
Talk USA Network
Tax Cap Committee
Taxpayers for Accountable Government
Taxpayers League of Minnesota
TEACH Michigan Education Fund
Teen-Aid
Tennessee Association of Christian Schools
Tennessee Christian Coalition
Tennessee Conservative Union
Tennessee Eagle Forum
Tennessee Institute for Public Policy
Tennessee Right to Life, Inc
Tennessee Shooting Sports Association
Term Limits Legal Institute
Texans for Fair Immigration
Texans for Tax Limits
Texans United for Life
Texas Christian Coalition
Texas Citizens for a Sound Economy
Texas Eagle Forum
Texas Home School Coalition
Texas Journal
Texas Justice Foundation

Texas Organization of Christian Schools
Texas Public Policy Foundation
Texas Right to Life Committee, Inc.
Texas State Rifle Association
The Abraham Lincoln Foundation For Public Policy Research
The Adirondack Solidarity Alliance
The African-American Life Alliance of Maryland
The Buck Eye Institute
The Center for Arizona Policy
The Christian Civic League of Maine
The Coalition on Urban Affairs
The Constitutional Coalition
The Fairness to Landowners Committee
Thomas More Center for Law & Justice
Toward Tradition
Tradition, Family, Property, Inc.
Traditional Values Coalition
U.S. Business and Industrial Council
U.S. English, Inc.
U.S. Family Network
U.S. Justice Foundation
United Conservatives of Ohio
United Republican Fund of Illinois, The
United Republicans of California
United Seniors Association
Urban Family Council
Utah Coalition of Taxpayers
Utah Eagle Forum
Utah Republican Assembly
Utah State Rifle & Pistol Association
Valley Forge Coalition
Vernon K. Krieble Foundation
Virginia Christian Coalition
Virginia Citizens for Sound Economy
Virginia Institute for Public Policy
Virginia Shooting Sports Association
VOCAL Foundation
WABS Radio
WallBuilders
Washington Citizens for Term Limits
Washington Family Council
Washington for Traditional Values PAC
Washington Republican Assembly
Watchdogs Against Government Abuse
Water from the Well Radio Broadcast
WBAL, Brian Wilson
WDJC (Birmingham, AL)
We the People Institute
We the People, Inc.
Well of Living Water Christian Ministries
West Virginia Eagle Forum
West Virginia Family Foundation
WGTT, David Robinson
What Washington Doesn't Want You to Know
Wisconsin Association of Christian Schools
Wisconsin Christian Coalition
Wisconsin Christians United
Wisconsin Information Network
Wisconsin Rifle and Pistol Association
Wisconsin State Sovereignty Coalition
Women Against Gun Control
Women for Responsible Legislation
WTNO - 1230 AM (West Palm Beach, FL)
WWNW, WFTH
Wyoming Eagle Forum
Yankee Institute for Public Policy
Young America's Foundation

For the Record
The Washington Times
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Democrats mount assault

Political ideology threatens judicial autonomy

By Thomas L. Jipping

The more things change, the more they stay the same. Senate Democrats have long pushed for appointment of judges who will deliver a certain political agenda, even if they have to make law to do it. Today's hearing titled, "Should Ideology Matter? Judicial Nominations 2001" is designed to provide cover for that campaign.

The campaign threatens the very freedom America's founders designed this political system to protect. In that system, the people govern themselves, decide policy issues and define the culture. This system operates within boundaries set by a written constitution, written so those boundaries would be clear and could only be changed deliberately by the people themselves. Those boundaries include giving legislative power, or the power to make law, to the people and judicial power, the power to interpret law, to judges.

This system protects freedom without dictating the results of exercising freedom. As the Supreme Court recently reaffirmed, priorities such as the separation of government power were established "to ensure our fundamental liberties." Since freedom itself is more important than the results of its exercise; protecting freedom requires maintaining those priorities. The real test comes when doing things the right way does not produce preferable results. If a law the people make is undesirable, is it legitimate to get others, such as judges, to make more desirable law, even at the cost of freedom?

Today's hearing is an attempt to justify that assault on freedom. The word "ideology" in its title means political ideology; that is, political results. The question, "should ideology matter?" is asking whether judges should be chosen based on the law they will make themselves rather than on their following the law made by the people. It is asking whether judges may cross the line from interpreting to making law in order to further a political agenda, to deliver certain goods at any cost, rather than simply follow the law so we can be free.

Think for a minute what this pursuit of political ideology entails. Those picking judges must know not just whether a nominee thinks he can make law on the bench, but also what law he intends to make. That is, they must know how a nominee will rule on key issues in future cases. Hence the trend in the last 15 years by Democrats toward increasingly intrusive questioning of nominees' views. Their inquisition demands to know not simply a nominee's view of the proper role and conduct of a judge. That goes to whether a judge may make law at all. It goes far beyond to examine a nominee's views on specific legal and political issues so that they know what law they can expect the nominee to make once confirmed.

This has been a favorite tactic of Democrats since at least 1987, when Harvard law professor Laurence Tribe counseled them to use it. Back then, Sen. Patrick Leahy, now Judiciary Committee chairman, asked Supreme Court nominee Robert Bork: "Would you agree or disagree . . . that the cases establishing a constitutional right to privacy . . . became part of our law, and that whatever theoretical challenges may be available to them, it is too late for the Supreme Court to tear them up?"

Demanding to know how a judge will rule on issues is demanding that he violate his judicial oath before even taking it, as a condition of employment. That oath, prescribed by federal statute, reads in part: "I do solemnly swear that I will administer justice without respect to persons . . . and impartially discharge and perform all the duties incumbent upon me as" a federal judge. Entering judicial service having made promises and commitments makes this impossible and obliterates judicial independence, what Chief Justice William Rehnquist has called the "crown jewel" of America's judicial system. Such judicial IOUs render judges impotent to protect the rights of citizens by obligating them to implement the political agenda of those who gave them power.

By identifying a nominee's political ideology, the results he would reach (as opposed to his judicial philosophy, how he would reach his results) proves elusive, Democrats may look for views to attribute to nominees. Since many nominees were practicing lawyers, either in the private or government sector, the inquisitors often try to attribute those clients' views to the nominee. This tactic is particularly appealing when, for example, a lawyer in the U.S. Solicitor General's office signs a Supreme Court brief taking the position that Roe vs. Wade was wrongly decided.

Yet even the American Bar Association's Model Rules of Professional Responsibility dispels this argument. Rule 1.2(b) states: "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." The same Democrats insisting that the ABA sets the "gold standard" for evaluating judicial nominees ignore that same ABA's more inconvenient standards.

Those, such as Mr. Tribe, who helped politicize the confirmation process in the 1980s, are behind today's hearing as well. The objective is the same: To make legitimate what America's Founders and the Constitution make illegitimate; that is, judges making law. To say that ideology does matter, that judges should take law-making power away from the people, is to say that results are all that count and that the ends justify the means. To say that ideology matters in picking judges is to say that freedom does not matter for anyone.

Thomas L. Jipping is director of the Free Congress Foundation's Judicial Selection Monitoring Project.

Statement of Thomas L. Jipping, M.A., J.D., Director, Judicial Selection Monitoring Project, Free Congress Research & Education Foundation

Mr. Chairman and members of the subcommittee, my name is Thomas L. Dipping and for nearly 12 years I have directed the judicial selection project at the Free Congress Research & Education Foundation. Since 1996, nearly 800 grassroots organizations have signed a statement of basic principles about the judiciary's proper role. I have submitted the letter, which Senators have received periodically, for the record with the cumulative list of signatories.

Since the late 1980s, the judicial selection debate has become more confused, with new terms added and familiar terms acquiring new meaning. Whether ideology matters in judicial selection, then, requires defining "ideology." Those who would answer in the affirmative mean political ideology, or the ultimate results of judicial decisions. This hearing, then, is really asking whether federal judges should be selected based on how they will rule on particular issues in cases that come before them.

The answer is no. Judges should be chosen on the basis of judicial philosophy, the way they reach results, not on the basis of political ideology, what those results are likely to be. Law is different than politics. The people have the power to make law, judges do not.

Government acting without lawful authority is, by definition, acting without the "consent of the governed" which the Declaration of Independence identifies as the source of its "just powers." The Constitution's separation of powers, established by America's founders "to ensure protection of 'our fundamental liberties'," [1] gives lawmaking power to the legislature and judicial power to the judiciary. These are not the same thing. Alexander Hamilton warned that "'there is no liberty if the power of judging be not separated from the legislative and executive powers.[2]

The terms "restraint" and "activism" denote judicial philosophy. Judicial restraint observes that separation of powers, judicial activism does not. A judge restrained by law that is made by the people takes that law as it is and applies it faithfully to reach whatever results that application produces. An activist judge takes the opposite approach, changing the law as necessary to achieve preferred results. For the restrained judge, the proper means legitimates the result; for the activist judge, the preferred end justifies the means.

The terms "conservative," "liberal," or "moderate," in contrast, describe political ideology and denote results rather than the process of reaching results. Judges can reach conservative or liberal results by either a restrained or activist process. The political ideology ends, however, do not justify the judicial philosophy means. No matter how pleasant or favorable the result, it is illegitimate if reached through improper activist means. Similarly, no matter how unpleasant or unfavorable the result, it is legitimate if reached through proper restrained means.

For example, the Supreme Court was correct in *Now* v. *Scheidler*,[3] unanimously concluding that the Racketeer Influenced and Corrupt Organization (RICO) Act can apply to social protesters. The statute simply did not contain any exemption and the Court lacked authority to create one. only Congress can change the law in this regard. This "liberal" result was the product of judicial restraint.

Similarly, the Supreme Court was wrong in *Troxel* v. *Granville*,[4] concluding that a state statute providing broad opportunities for child visitation violated a constitutional right of parents to direct the upbringing of their children. No such substantive, enforceable right exists in the U.S. Constitution. The Court created it in the 1920s. As Justice Antonin Scalia put it in dissent, "[i]f we embrace this unenumerated right, I think it obvious. . .that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law." [5] No matter how attractive this might appear, courts—as opposed to legislatures—have no power to do it.

As political or social conservative, I must admit that a liberal result achieved by judicial restraint is legitimate and a conservative result achieved by judicial activism is not.

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[1] *Gregory* v. *Ashcroft*, 501 U.S. 452,458 (1991), quoting *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234,242 (1985).

[2] A. Hamilton, The Federalist No.78 (C. Rossiter ed., 1961), at 466, quoting Montesquieu, The Spirit of Laws (1758) (T. Nugent trans., Rothman 1991), at 152.

[3] 510 U.S. 249 (1994).

[4] 530 U.S. 57 (2000).

[5] 530 U.S. 57, 93 (2000) (Scalia, J. dissenting).

Conditioning judicial appointments on expected results requires determining what to expect. The process of demanding and extracting commitments or promises from judicial nominees about the decisions they would render as judges creates a myriad of problems that undermine "our fundamental liberties."

First, it requires judges to violate their judicial oath before they take it. That oath requires them to "administer justice without respect to persons" and to impartially discharge" their judicial duties. Public positions on issues that will arise in future cases make these goals impossible.

Second, it directly threatens judicial independence, "the most essential characteristic of a free society."[6] The American Bar Association's Commission on Separation of Powers and Judicial Independence identified as a threat to judicial independence that "the Senate may seek. . .assurances from nominees, as a prerequisite to confirmation."[7] Indeed, conditioning confirmation on promises or commitments of future decisions—that is, on ideology—is perhaps the single greatest threat to so-called "decisional independence."

To conclude, judicial philosophy matters because the way judges achieve results, conservative or liberal, matters. If ideology matters in choosing judges, freedom no longer matters for anyone.

Statement of Hon. Edward M. Kennedy, a U.S. Senator from the State of Massachusetts

Mr. Chairman, thank you for holding this important hearing on the confirmation process. The advice and consent role of the Senate in the appointment of justices and judges is one of our important responsibilities, and it serves the nation well.

In fact, the judicial confirmation process was debated heatedly by the Framers of the Constitution. Some even suggested that the Senate should have sole responsibility for the appointment of judges. The division of responsibility that we have today was a key part of the "checks and balances" compromise that shapes many aspects of our democracy.

Over the years, there have been many major debates over judicial nominees, especially to the Supreme Court. During the first 100 years after ratification of the Constitution, 21 of 81 Supreme Court nominations—one out of four—were rejected, withdrawn, or not acted on. Since 1968, one-third of all nominees to the Supreme Court have failed. During these confirmation debates, ideology mattered. John Rutledge, nominated by President George Washington, failed to win confirmation as Chief Justice in 1795 when Alexander Hamilton and other Federalists opposed him because of his position on the Jay Treaty. A nominee of President James Polk was rejected because of his anti-immigration positions. A nominee of President Hoover was not confirmed because of his anti-labor views. The Senate failed to elevate Justice Abe Fortas to Chief Justice in 1968 when Senate Republicans filibustered President Johnson's nomination because of his decisions on defendants' rights and free speech.

Ideology is no less important when the Senate considers nominations to other federal courts. Intelligence, integrity, and temperament are important issues, but the Senate also has a responsibility to determine whether the nominee is committed to values at the core of the Constitution.

Senate confirmation hearings are not rubber stamps. It isn't enough for a nominee to tell us that *Brown* v. *Board of Education* was correctly decided. We must know if a nominee has a commitment to progress in the area of civil rights and other rights cherished by millions of Americans. The burden is on the nominee and any doubts must be resolved in favor of the Constitution. These are lifetime appointments, and the Senate has few responsibilities that are more important for the nation than assuming the high quality of federal justice.

Thank you Mr. Chairman, and I look forward to the testimony of today's witnesses.

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[6] Ervin, "Separation of Powers: Judicial Independence," 35 Law & Contemporary Problems 108,121 (1970).

[7] American Bar Association, An Independent Judiciary (1997), at 24.

Statement of Robert S. Litt, former Deputy Assistant Attorney General, Criminal Division and Principal Associate Deputy Attorney General, U.S. Department of Justice

Mr. Chairman, members of the Subcommittee:

Thank you for this opportunity to provide my views on the need for a moratorium in federal executions. A moratorium is essential to ensure both that the death penalty is carried out in a fair and non-discriminatory manner, and that the public is confident that it is.

Let me begin with my views on the death penalty generally. Were I a member of Congress, I would not vote for the establishment of the death penalty. I have been both a prosecutor and a defense lawyer. Our criminal justice system contains numerous safeguards to protect the rights of a defendant and to ensure that justice is done, but it still depends ultimately on the actions and judgments of humans. None of us is infallible; our justice system is therefore not infallible. We confront its fallibility almost daily, with the overturning of convictions of defendants—including defendants who have spent years on death row. Just last week, in fact, a Florida man was released after serving 22 years in jail for murders he did not commit.

We therefore can never be certain that every person sentenced to death is guilty of the crime with which he or she is charged. Mistakes have happened in the past; they will happen in the future. I am sufficiently troubled by the likelihood that the government would take the life of an innocent person that I would not vote for a death penalty statute.

However, the Congress has established a federal death penalty, which the courts have upheld. I joined the Department of Justice aware of the federal death penalty statutes and committed to my responsibility to enforce the laws that Congress enacted. Indeed, while I was at the Department, I was involved in several matters in which the Department sought the death penalty, and did so conscientiously and in accordance with Congress' intent.

Any death penalty statute, however, must be implemented in a manner that is fair and non-discriminatory. Since the Supreme Court struck down the then-existing death penalty statutes in 1972, it has been clear that, in order to be constitutional, the death penalty cannot be applied in an arbitrary or discriminatory manner. I think that everyone agrees on this, regardless of his or her views on the death penalty.

Unfortunately, we cannot say with assurance today that the federal death penalty is carried out in a consistent and non-discriminatory fashion. While I was at the Department of Justice, Attorney General Reno asked for a review of information concerning defendants who were subject to the federal death penalty. That review revealed unexplained racial and geographic disparities. Attorney General Reno and Deputy Attorney General Holder therefore asked for a more comprehensive analysis.

The results of the fuller analysis were released last September, and they confirmed the disparities that we had observed two years earlier. From 1984 through 2000, approximately 70% of the defendants against whom the Department sought the death penalty were African-American or Hispanic. Moreover, a few jurisdictions, mostly in the South but also including Puerto Rico, accounted for a disproportionate number of death penalty cases. In short, these statistics raised the disturbing possibility that whether a defendant was sentenced to death might depend less on the defendant and his offense than on where he was prosecuted and what his race or ethnic group was.

Of course, taken alone, these statistics do not demonstrate that there is intentional or systemic discrimination in the application of the federal death penalty statute. There might be legitimate reasons for these stark disparities. But without further analysis, we cannot rule out that there may be some systematic factors operating in a discriminatory fashion. And there can be no disputing that an African-American or Hispanic should not be more likely to receive the death penalty simply because of his or her race or ethnicity. Fairness and justice require that we look further into these disparities.

In response to the troubling questions raised by the September 2000 survey, Attorney General Reno and Deputy Attorney General Holder ordered the Department to conduct a variety of other studies. Most importantly, they asked the National Institute of Justice to assess the relationship between the state and federal criminal justice systems and how they affect the imposition of the death penalty. To ensure the integrity of the investigation and the reliability of the results, the Attorney General requested that outside experts be included. And while the Attorney General did not ask for a moratorium on federal executions, she did not need to: President Clin-

ton delayed the only execution scheduled to occur during his Administration in order to permit the Department to carry out these studies.

The present Attorney General has taken a somewhat different approach. First, the Attorney General delayed for several months proceeding with the National Institute of Justice study. I am pleased that the Department has finally decided to move ahead with this study. If properly carried out, it will be our best source of information concerning the reasons for the disparities identified above.

Second, the Department of Justice recently released a summary of its further analysis of the data collected by Attorney General Reno and Deputy Attorney General Holder, supplemented by some additional material. Unfortunately, I do not think that the most recent report is as convincing as the Department claims. It is not possible to evaluate the report in full, as the Department has not released the underlying data but only its own analysis. Nonetheless, some of the shortcomings of the report are obvious. While others have discussed them in more detail, I would like to highlight some points that I find particularly significant.

The new report relies heavily upon the observation that, of those defendants who are charged with capital offenses, the death penalty was sought for a higher proportion of white defendants than minorities. But resting on this point ignores an extremely significant question: why are 80% of those defendants who are charged with federal capital offenses African-American or Hispanic? Indeed, the fact that the Department, through a process that is designed to be race-blind, decides that more minorities than whites should be dropped from the death penalty process, itself suggests the possibility that too many minorities are initially being charged with capital crimes. The Department's report offers some speculations as to the reasons why such a high proportion of capital defendants is African-American or Hispanic, but a thorough and impartial study is needed to determine whether or not the Department's speculations are grounded in fact.

Second, why do a significantly higher percentage of white defendants than minority defendants escape the death penalty through plea bargains? The Department's report noted this disparity, and Attorney General Ashcroft has commendably taken steps to try to bring greater uniformity to the plea process in future capital cases. But this does not answer the question of whether there were serious problems between 1988 and today, which could affect not only to the 19 men presently on federal death row, but the dozens of other federal capital cases pending resolution.

In addition, the Department's analysis did not satisfactorily deal with the issue of geographic disparity. The Department's position is, essentially, that each of the districts which charges a comparatively high number of capital cases has reasons for doing so. But without looking at those districts that do not charge as many capital cases, to see if the same factors are applicable there, the Department cannot establish that the death penalty is being applied with the consistency that fundamental fairness and constitutional principles of equal justice require.

For example, the Department noted that most of the very large number of capital cases from the Eastern District of Virginia resulted from drug murder cases. It explained the basis for charging these cases federally by reference to certain deficiencies in state criminal procedure. But these deficiencies exist in other states as well, including, perhaps, states where the federal prosecutors did not seek the death penalty with such frequency. Without comparing similar districts we cannot tell whether or not the factors mentioned by the government are actually the reason for the disparities. Nor does the report adequately explain why some districts seek the death penalty in a much higher proportion of capital cases than other districts.

In short, the Department's recent report, in my view, does not dispel the shadow of unfairness and inconsistency in the application of the death penalty. More study is needed so that we can be certain that a defendant's race or ethnicity, or the state where the crime was committed, play no role—conscious or otherwise—in the decision whether or not to seek the death penalty. Indeed, the Department recognizes the need for further analysis, since it has now committed to going forward with the National Institute of Justice study.

However, the Department has refused to delay executions until these studies are completed, and I find this rush to execution inexplicable. There is much to be gained and nothing lost by halting executions until we are fully satisfied that no subtle or systematic discrimination infects the administration of the federal death penalty. Would not the interests of justice be better served by awaiting the results of the Department's studies studies that could have been underway by now if the present Administration had not delayed them? And, equally important, given that many African-Americans and Hispanics question whether the criminal justice system treats them fairly, doesn't the public perception of justice require that we be satisfied, before anyone is executed, that the death penalty was sought against that person by a fair and unbiased process?

It is no answer to say, as the Attorney General does, that Juan Garza is guilty and deserves to die. The need for a moratorium on executions has nothing to do with Juan Garza's individual case, but relates to the fairness of the system. We do not permit the conviction of a defendant who was tried by a jury from which members of one race were excluded, regardless of how guilty he or she is. We should not permit the execution of a defendant who was selected for the death penalty by a discriminatory process, regardless of how guilty he or she is.

Mr. Chairman, I recognize and sympathize with those who believe that, if we are to have a death penalty, it should be carried out with reasonable promptness. But the death penalty is uniquely irremediable in the criminal justice system. If the studies requested by Attorney General Ashcroft determine that there is no discrimination in the application of the federal death penalty, then executions can go forward. But if the Department of Justice studies find that the federal death penalty operates in a discriminatory manner even if there is no intentional discrimination by individual members of the Department we will not be able to undo the death of those who were executed as a result of an unfair process. For this reason, I believe that there should be a moratorium on all executions until the Department completes the studies it has undertaken. If the studies demonstrate that the system is discriminatory, the moratorium should remain in effect until the system is fixed.

Thank you for this opportunity to be heard.

Statement of John McGinnis, Professor, Benjamin N. Cardozo School of Law

Thank you for the opportunity to submit this statement to your committee. I am a law Professor at the Benjamin N. Cardozo School of Law who has written about the judicial appointments process. Here I summarize my views for your committee. A longer discussion together with citations can be found in John O. McGinnis, The President, the Senate, the Constitution and the Confirmation Process: A Reply to Professors Strauss and Sunstein, 71 TEX. L. REV. 633 (1993).

I limit myself to three propositions. First, the President has sole authority to nominate judges and has no obligation to take advice from the Senate. Second, the President has an obligation to take into account the nominees' views on how to interpret the Constitution. Such urisprudential views should be sharply distinguished from political ideology, because a theory of constitutional jurisprudence is a theory of interpretation, not a theory for getting politically pleasing results. Third, the Senators are of course free to take into account the jurisprudential views of the nominee as well, but once again that should be distinguished from a checklist of the nominee's positions on the most political controversial issues of the day. The structure of the Constitution suggests the Senate will succeed in blocking presidential nominees only for weighty and substantial reasons.

1. THE PRESIDENT'S ROLE

The Appointments Clause assigns to the President the sole responsibility for making nominations to the judiciary. Contrary to the claims of some scholars, a constitutional prenomination advisory role for the Senate is utterly belied by the text and the purpose of the clause. Similarly, the overwhelming weight, if not the unanimity, of historical sources that bear on the clause's meaning argue against such a role.

The Appointments Clause provides in relevant part: "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . ." The very grammar of the clause is telling: the act of nomination is separated from the act of appointment by a comma and a conjunction. Only the latter act is qualified by the phrase "advice and consent." Furthermore, it is not at all anomalous to use the word "advice" with respect to the action of the Senate in confirming an appointment. The Senate's consent is advisory because confirmation does not bind the President to commission and empower the confirmed nominee. Instead, after receiving the Senate's advice and consent, the President may deliberate again before appointing the nominee.

The purpose of dividing the act of nomination from that of appointment also refutes any notion of a prenomination role for the Senate. The principal concern of the Framers regarding the Appointments Clause, as in many of the other separation-of-powers provisions of the Constitution, was to ensure accountability while avoiding tyranny. Hence, they gave the undiluted power of the nomination to the

President so that the initiative of choice would be a single individual's responsibility, but provided the check of advice and consent to forestall the possibility of abuse of this initiative. Gouverneur Morris described the advantages of this multistage process: "[A]s the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security."

The Federalist., also understands the power of nomination as an exclusively presidential prerogative." Indeed, Alexander Hamilton answers critics who would have preferred the whole power of appointment to be lodged in the President by asserting that the assignment of the power of nomination to the President alone assures sufficient accountability:

> [I]t is easy to show that every advantage to be expected from such an arrangement would, in substance, be derived from the power of nomination which is proposed to be conferred upon him; while several disadvantages, which might attend the absolute, power of appointment in the hands of that officer would be avoided. In the act of nomination, his judgment alone would be exercised; and as it would be his sole duty to point out the man who, with the approbation of the Senate, should fill an office, his responsibility would be as complete as if he were to make the final appointment.

Thus, a constitutional prenomination role for the Senate would be at odds with the Framers' interests in assuring the President's undivided accountability for the initial choice.

Closely related to the Framers' interest in assuring accountability was their interest in avoiding an appointment that would be the result of secret deals. Once again The Federalist is instructive. In defending the clause's structure of presidential nomination and public confirmation, Hamilton contrasted it with the appointments process by a multi member council in his own state of New York. Such a council acting in secret would be "a conclave in which cabal and intrigue will have their full scope . . . . [T]he desire of mutual gratification will beget a scandalous bartering of votes and bargaining for places." Delegates to the Constitutional Convention had expressed similar concerns. Thus, the assertion of a prenomination role for the Senate runs afoul of the Framers' concerns about selection by multi member bodies. If the Senate had a formal prenomination advisory role, the Senate leaders and the President might well be tempted to make a deal that would serve their parochial interests and then be insulated from all but pro forma scrutiny.

Other contemporaneous commentary on the Appointments Clause repudiates any special prenomination role for the Senate. For instance, James Iredell a leading proponent of ratification in North Carolina and subsequently a Supreme Court Justice observed at his state's ratifying convention,

> As to offices, the Senate has no other influence but a restraint on improper appointments. The President proposes such a man for such an office. The Senate has to consider upon it. If they think him improper, the President must nominate another, whose appointment ultimately again depends upon the Senate.

Jefferson also makes plain that for once his view on an issue of constitutional interpretation coincides entirely with that of Hamilton: "The Constitution itself indeed has taken care to circumscribe [the appointments process] within very strict limits: for it gives the nomination of the foreign Agent to the President, the appointment to him and the Senate jointly, fire commissioning to the President."

Finally, the construction of the Appointments Clause that reserves the act of nomination exclusively to the President is supported by the practice of the first President and Senate. In requesting confirmation of his first nominee, President Washington sent the Senate this message: "I nominate William Short, Esquire, and request your advice on the propriety of appointing him. "The Senate then notified the President of Short's confirmation, which showed that dray too regarded "advice" as a postnomination rather than a prenomination function: "Resolved, that the President of the United States be informed, that the Senate advise and consent to his appointment of William Short Esquire . . . ." The Senate has continued to use this formulation to the present day.

President Washington made his view that the Senate has no prenomination role even more explicit when he wrote in his diary that Thomas Jefferson and John Jay agreed with him that the Senate's powers "extend[] no farther than to an approbation or disapprobation of the person nominated by the President, all the rest being Executive and vested in the President by the Constitution."

Washington's construction of the Appointments Clause is the same one embraced by his successors. Not one subsequent President has recognized a constitutional role for senatorial advice prior to nomination. To be sure, some Presidents have consulted with key Senators and a few with the Senate leadership, but they have done

so out of comity or political prudence and never with a declaration of constitutional obligation. Because the branches are not "'hermetically' sealed from one another," informal interchange between the branches can be expected and does not support any constitutional role for the Senate in the prenomination process.

II. The President's Obligation to Consider Jurisprudential Views of Nominees

Once it is understood that the power of nomination is textually committed solely to the President, it is clear that any analysis of the structure of the Appointments Clause must begin not with the advice and consent function of the Senate but with the nomination power of the President. In this, as in all other acts of exclusive presidential authority, the President must be guided by his robust oath to "preserve, protect and defend the Constitution of the United States." Thus, the President appears to be under a constitutional obligation to nominate as judges individuals who he believes will interpret the Constitution in a manner that generally accords with his view of its lawful construction. A President who nominated a jurist whose constitutional views differed fundamentally from his own would abrogate this most solemn oath.

That the President has constitutional obligations in his act of nomination is neither startling nor anomalous. Substantial evidence indicates that the Framers contemplated that the President would take account of his constitutional responsibilities when carrying out his presidential duties. For example, the Framers clearly understood that the President would veto unconstitutional laws. It was even contemplated that the President would refuse to execute laws that violate the Constitution. Indeed, the President's constitutional vigilance is essential to the entire governmental structure because the ultimate protection against constitutional error is the power of the people to overturn error, using the democratic process to influence the composition of the political branches. Thus, when a President campaigns, as Presidents Reagan and George W. Bush did, on pledges to promote judges of a particular constitutional philosophy, they are making a pact with the people concerning the exercise of one of their fundamental presidential responsibilities.

To acknowledge the central importance of the President's nominating a jurist with what the President believes are correct constitutional principles is not to suggest that the President should investigate a potential nominee's views on particular cases. A federal judge's task is not to make a series of unconnected policy pronouncements on individual issues, but to apply a coherent body of interpretative principles to the full range of constitutional (and statutory) questions that come before the court. One of the advantages of the independent and life-tenured judiciary provided by Article III of the Constitution is that it is at least relatively shielded from partisan and policy pressures that may distort the application of even firmly held principles in particularly controversial cases. Thus, it is wholly appropriate for the President to satisfy himself as to the nominee's views at a level of generality commensurate with a proper understanding of the Article III judiciary's comparative advantage in principled decisionmaking.

Thus, I believe it would be misleading to say that a President committed to the Constitution makes ideological appointments. Ideology is a word more suited to politics. Constitutional interpretation should know no ideology. The Constitution is the document that holds us together as Americans despite political and ideological differences. Of course, there may be disagreements about interpretative principle but these disagreements are different from ideological disagreements, because they should not be rooted in a desire for particular results, but in a theory of the how the constitution is best construed. In considering judicial nominees, we should be mindful of Chief Justice John Marshall's famous exhortation that "we should never forget it is a constitution we are construing." Discussions of judicial nominees should be discussed in terms of constitutional construction, not ideology.

Moreover, even if adherence to a proper view of constitutional construction is a necessary qualification for nomination, it is hardly a sufficient one. Judicial temperament is also important, for it is only such temperament that allows a judge to resist the improper pressures, both from the outside world and within himself, that can interfere with the proper application of interpretative principles. Furthermore, once the President has ascertained that the nominee shares his basic constitutional principles, he is at liberty to take political considerations, such as geography and other kinds of political diversity, into account to guide his final choice. He may, of course, consult members of the Senate or anyone else in performing this political calculus.

III. THE SENATE ROLE IN EVALUATING NOMINEES' VIEWS.

The Senate has the ability to evaluate the nominees' jurisprudential views as well. It is important to note two considerations in this regard. First, the Framers created a constitutional structure that makes it difficult for Senate to successfully oppose a President of ordinary political strength for narrow or partisan reasons, thus permitting the initiative of choice to rest with a single national leader who is more likely than a legislative body to select a candidate of consistent constitutional principle. Second, the Senate, like the President, should distinguish between jurisprudential views and ideology if we are to fulfill the promise of a judiciary that operates according to law rather than politics.

The structure of the Constitution suggests that Senators may evaluate the jurisprudential views of nominees. Senators too have taken an oath "to support the Constitution "It is thus reasonable to infer that the Framers located the process of advice and consent in the Senate as a check to prevent the President from appointing jurists of unsound principles as well as jurists of unsound character or competence.

The Framers did not, however, expect the Senate to exercise so independent a choice that it would rival the President in determining the nature of appointments. As noted earlier, the Framers expressly contrasted the role of the President, who was given a role of plenary choice in the appointments process, with that of the Senate, which was given only the power of rejection. Given that the Senate was not to exercise choice itself, it appeared to Alexander Hamilton that a nominee should be rejected only for "special and strong reasons." Moreover, according to The Federalist, the Senate must persuade the public that its reasons compelled rejection, for otherwise the "censure of rejecting a good [nomination] would lie entirely at the door of the Senate." Thus, the original understanding of the Appointments Clause does not contemplate rejections for reasons of partisanship or disagreement over the nominee's likely vote in a single case, because these reasons would be neither special nor strong.

The Framers, however, did not depend on exhortations in The Federalist alone to prevent the Senate from refusing confirmations for other than weighty and publicly compelling reasons. The first of these structural advantages is the President's power of repeated nomination. The Federalist is quite explicit in noting that this authority will tend to discourage rejections for less than publicly compelling reasons. In particular, this structural advantage ensures that it will be futile to reject a candidate for reasons of jurisprudential point of view unless the Senate can bear the burden of persuading the public that the interpretative principles espoused by the nominee are unsound. If it fails to make that case and rejects the nominee for a pretextual reason (e.g., disagreement with some past political position of the nominee or his express views on some particular case), the President would generally be in a position to find a second candidate without these putative defects who generally shares the President's jurisprudential "point of view."

The President's second structural advantage is the unitary nature of the executive office as compared to the diffuse and variegated nature of the Senate—even when it is controlled by the opposition party. The notion that the Senate should have an essentially coequal role in the confirmation process is based on the notion that a government where the Senate is controlled by one party and the executive by another is a government equally divided." The President, however, is a single individual possessed of a single view of the Constitution, whereas the Senate is a body composed of many individuals with a wide range of views, including members with views like that of the President. When the President has a substantial basis of party support in the Senate and thus a nucleus of probable supporters, he will be in a position to persuade those in the other party whose constitutional views are most like his own to support his nominee. Thus, the image of a divided government with the Presidency and the Senate in the hands of different parties as a government in any sense equally divided when it comes to an analysis of the Appointments Clause and the confirmation process is a fundamentally false image, as recognized by George Mason: "Notwithstanding the form of the proposition by which the appointment seemed to be divided between the Executive & Senate, the appointment was substantially vested in the former alone." Moreover, the President's advantage in the process is a considered feature of the Framers' design: they knew how to create a process by which the power of the Executive and the Senate would be rendered more equal. Because of their substantial fear of foreign entanglements, for instance, they required a two-thirds majority of the Senate to ratify treaties before they become the law of the land.

The final presidential advantage is the stronger mandate that generally flows from his role in the structure of the Appointments Clause. Because it is known that the President bas the initiative of choice in the appointment of Supreme Court Jus-

tices, the jurisprudential views of prospective appointments are likely to become a campaign issue between candidates with differing constitutional philosophies. On the other hand, because each Senator is only one voice of many in ratifying the President's choice, the issue of judicial appointment is generally of less importance to the rational voter than are issues over which the Senator is likely to possess more initiative. Accordingly, as a general matter the President can rely on a greater mandate for his choice than a Senator can for his opposition.

Second, we will have a better judiciary if the Senate focuses on character and jurisprudential views rather than ideology as encapsulated by political disagreements on the divisive issues of the day. An inordinate emphasis in confirmation hearings on single issues presented in largely political terms (currently the issue of most prominence is abortion) endangers the distinction between law and politics because it may suggest that a judge is charged with making policy on a set of discrete issues rather than applying a coherent body of legal theory to all cases. Moreover, the aspects of the modern confirmation process that resemble a political campaign may encourage Presidents to seek easy confirmations (and by doing so, conserve their political capital) by choosing nominees with characteristics likely to command political support rather than outstanding jurists with consistent constitutional principles.

A focus by the Senate on ideology so defined is likely to exacerbate the tendency to evaluate the nominee on the basis of politically driven issues and result in less distinguished nominees given that judicial distinction of any sort is unlikely to arise from a jurisprudence aligned most closely with politically popular positions on the controversies of the day. Indeed, the Framers rejected the multimember council as a means for selecting appointees at least in part because of their concerns over the effects of political horse trading on the quality of nominees. Moreover, the dangers that a greater senatorial role poses to any jurisprudence of consistent principle can also readily be understood in terms of the fundamental tenets of republican theory outlined by Madison in The Federalist No. 10. Senators represent smaller political entities than the President and thus are more likely to be responsive to particular factions intensely interested in the outcome of a particular case. The President, representing the nation as whole, is in a better position to rise above faction and make his choice on the basis of a consistent jurisprudential position that will apply across the full range of cases. Thus, a larger role for the Senate is likely to lead to a greater focus on the nominee's position on the current political controversies of the day or his membership in an ethnic group or some political faction rather than on more appropriate matters such as the soundness and coherence of the nominee's jurisprudential views and the quality of his legal reasoning.

CONCLUSION

The Constitution assigns fundamentally different responsibilities to the President and the Senate in the appointment of judges. Both may consider the jurisprudential views of nominees but the structure of the Appointments Clause gives the President a substantial advantage in having his views prevail. Finally, the modern confirmation process shows the risk of substituting ideological and issue driven evaluation of nominees for inquiries into their character and jurisprudential views.

PEOPLE FOR THE AMERICAN WAY FOUNDATION
July 3, 2001

Senator Charles E. Schumer, Chairman
Subcommittee on Administrative Oversight
and the Courts
313 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Schumer:

As a member of the bipartisan Task Force on Federal Judicial Selection of Citizens for Independent Courts, I am writing to clarify several aspects of the testimony at the hearings held by the Subcommittee on June 26 with respect to the report of the Task Force. Some of the testimony at the hearing, particularly the testimony of Clint Bolick who specifically identified me as a member of the Task Force, may have left mistaken impressions concerning the Task Force report, which should be clarified for the record.

First, the Task Force report clearly states that it is appropriate for Senators to consider ideology, in the sense that you defined it at the hearing, in reviewing judi-

cial nominations. The Task Force report criticized the use of ideology in the "pejorative" sense of "fixed or rigid ideological commitments to certain results whatever the facts or law of the case," which are "often connected to partisan differences." But in the broader sense that you used the term "ideology" at the hearings, the Task Force specifically stated that "it is appropriate to encourage reviewers to investigate the ideology of candidates for federal judgeships." In particular, the Task Force stated that:

> (I]t is both appropriate and important for reviewers to ask questions designed to flesh out a candidate's underlying philosophical and normative commitments. These could include, but would not necessarily be limited to, questions about a candidate's general attitudes about justice, about reasoning from precedent, about major constitutional values such as liberty and equality, and about leading cases in our legal culture.

A complete copy of the Task Force report, as printed in 2000 by Citizens for Independent Courts as part of Uncertain Justice, is enclosed with this letter for inclusion in the record of the Subcommittee's hearings.

Second, Mr. Bolick's testimony claims that the Task Force "decries the blue-slip process. With all due respect, this is an inaccurate characterization. The task Force did not condemn the blue-slip process itself, but instead was concerned about the recent abuses of that process, which contributed to delays of more than four years in considering some of President Clinton's judicial nominations. As the New York Times wrote in April, appropriate and judicious use of the blue-slip process can produce positive results, including helping to "secure a balanced array of nominees that includes centrists along with conservatives." A copy of a recent People For the. American Way Foundation memorandum on the blue-slip process is enclosed with this letter for the record.

I hope that this letter will be helpful. to the Committee in its deliberations. Please do not hesitate to contact us if we can provide any further information.

Thank you.

Sinecerely,

ELLIOT M. MINCHERG
General Counsel and Vice-President

Statement of Roger Pilon, Vice President for Legal Affairs at the Cato Institute & Director of Cato's Center for Constitutional Studies

Timed nicely for Sen. Charles Schumer's hearings this afternoon on judicial ideology and the Senate confirmation process, Democratic party elder Joseph A. Califano Jr., placed an op-ed in last Friday's *Washington Post* entitled, "Yes, Litmus-Test.ludgcs." The wraps are now fully off the Democrats' plan to block President Bush's nominees for the federal courts unless they meet a Democratic ideological litmus test. Early in the year, still smarting from the Supreme Court's ruling in *Bush* v. *Gore*, academics like Yale Law School's Bruce Ackerman urged Senate Democrats to reject every Bush nominee to the bench until the White House had a legitimate occupant. That was too much, of course. But Senate Democrats, once they regained power, did the next best thing. They've turned the judicial confirmation process into a full-blown ideological affair, with today's only the latest in a series of hearings not on the Bush nominees but on judicial ideology and the Senate's confirmation role.

Califano now gives us the rationale for it all. Gridlock and big money, he says, have long kept Congress from legislating on a wide range of urgent matters. As a result, concerned citizens have been plying the courts with petitions they once took to the legislative and executive branches, making the courts "increasingly powerful architects of public policy." Indeed, "who sits in federal district and appellate courts is more important than the struggle over the budget, the level of defense spending," and virtually everything else going on in Washington today. For we've all learned, he continues, "that what can't be won in the legislative or executive may be achievable in a federal district court where a sympathetic judge sits." Thus, it's time for the Senate to step in, not to legislate but to determine, on explicitly ideological grounds, who the judicial architects will be, who will be "setting national policy" from the bench.

What a striking picture. Everything is politics. Nothing is principle. Indeed, it is not a little noteworthy that over the entire article, devoted to our most basic political arrangements, the word "constitution" appears not even once. That's no acci-

dent. The Constitution sets forth the principles and the rules under which we're supposed to be governed. It divides and separates power, assigning different tasks to different parts of government.

But on Califano's view, judges don't apply law to decide disputes, as the Constitution contemplates. "Sympathetic judges" make law, like so many legislators, "setting national policy" in the process. As for our nominal legislators, the Senate is reduced to vetting and electing our true rulers. One imagines that the word "constitution" doesn't appear in Califano's article because the document is an embarrassing relic, utterly inconsistent with his picture of a thoroughly politicized judiciary.

Yet for all that, Califano's picture, unfortunately, is too close to the truth to be ignored. The lesson he and his fellow Democrats have drawn from it is wrong—unless, of course, they like the picture. But we are today, in all candor, a very long way from living under constitutional principle.

The main origins of the problem are in the Progressive Era of a century ago, when the social engineers of the time sought to do through government what the Constitution left to be done in the private sector. Things came to a head during the New Deal when a frustrated Franklin Roosevelt attempted to pack the Supreme Court, an event Califano notes without comment. The scheme failed, but FDR won the day when a cowed Court began rethinking the Constitution, effectively eviscerating constitutional limits on federal power. Although the Court that emerged, by virtue of its deference to the political branches, was called "restrained," it was, in truth, "activist"—finding congressional and executive powers nowhere granted, ignoring individual rights plainly in the Constitution. And the Court's rethinking led ineluctably to the shift of power to the judicial branch.

The shift had two aspects. First, with the political branches now free to rule almost every aspect of our lives, it was only a matter of time before their ever-expanding product ended up in the courts, with the courts asked to sort out the mess Congress was making of things. But second, those who had long pushed such programs didn't always win in the political branches. When that happened, they turned increasingly to the courts, trying to win there, from "sympathetic judges," what they had failed to win politically. Regrettably, the Warren and Burger Courts, already deferring to the political pursuit of "social justice," were too often only too willing to step into the fray, imagining themselves to be a legislature of nine.

The Rehnquist Court, by contrast, has taken modest steps over the past decade toward resurrecting constitutional principles of limited government. However modest, those steps have alarmed liberal Democrats. They can't imagine anyone thinking that Congress's powers are limited. They can't imagine that if an end is worthy, Congress might still not have the power to pursue it. They can't imagine that James Madison, the principal architect of the Constitution, was serious when he wrote in Federalist #45 that the powers of the new government would be "few and defined."

Do we want to ensure the separation of powers and an independent judiciary? Do we want to restore limited constitutional government and, let's be clear, the rule of law? Those are the stakes in the current debate. If Senate Republicans are serious, they cannot pretend otherwise as the confirmation battles unfold.

Statement of Hon. Paul Strauss, Shadow U.S. Senator elected by the voters of the District of Columbia

Chairman Feingold, and Members of the Senate Subcommittee on the Constitution, Federalism, and Property Rights, I am Senator Paul Strauss, the United States Senator elected by the voters of the District of Columbia, and an attorney who practices in our local courts.

I appreciate the opportunity to provide this statement on behalf of my constituents, the citizens of Washington, D.C. I am testifying in order to raise my voice in favor of a moratorium on the federal death penalty, until a full investigation into racial disparities in the system can be conducted. I commend the leadership for bringing this issue the attention that it deserves.

It is especially disturbing that seventeen of the nineteen people on federal death row are minorities. One of the issues that was brought up is that the racial disparities on federal death row, which seem to be greater than those in the state system might be due to the federal prosecution of local crimes. It has been noted that, in fact, many of the federal death penalty cases are for crimes related to federal crack cocaine prosecutions.

one of the witnesses, Mr. McBride, a former federal prosecutor from the Eastern District of Virginia who has tried federal capital cases, has stated that the federal

government only steps into local cases when there is a request for such action from state prosecutors. In the District of Columbia, it appears that a different rule applies.

The residents of Washington, D.C. have consistently raised their voices in opposition to the death penalty. First, in 1992, they voted against it in a referendum, with a margin of two to one.[1] Then, in 2000, the city council passed a resolution once again reaffirming opposition to capital punishment. The city has certainly not asked for federal intervention in order to have the death penalty imposed on its residents.

Recently, however, the Federal Government has seen fit to prosecute Tommy Edelin, a District of Columbia resident, on charges of capital murder, for crimes commited within the District of Columbia. Many see his case as a test case for federal involvement in prosecuting crimes committed within Washington, D.C. This case is not an issue of a crime committed against the federal government, or on federal property, but is an issue of a crime committed against the people of the District of Columbia.

While I recognize that national sentiment seems to be in favor of the death penalty, if local residents do not wish to see capital prosecution for local crimes, then the death penalty should not be forced upon them, whatever the national sentiment is. In light of recent information showing possible racial disparities in implementation of the federal death penalty, it seems that by prosecuting residents of the District of Columbia, which has a large minority community, these disparities will only increase.

Although my main concern is with the representation of the ideas held by my constituency, I recognize the larger issue as well. The debate about the death penalty as a whole is perhaps one of the most divisive in our society today. Many people are adamantly opposed to its continued use, and see it as cruel and unusual punishment, while even more see it as a useful tool in the spectrum of punishments for crimes. It is obvious that the debate on that issue will not end anytime soon.

The death penalty is the obviously most permanent form of punishment that we have in this country. There should be no room for error in its implementation, and not even an appearance of bias in its prosecution. To continue to have a perception of bias would cause further doubts in an institution that many Americans already see as flawed.

Those who see the federal death penalty as fair and unbiased would be wise to listen to the testimony of David Bruck. When he spoke about the situation in south Africa during apartheid, he spoke of judges who said much of what many Americans are saying now: "blacks commit more crime." in hindsight, and to many at the time, that statement seems to be farcical. While I am not saying that we live under apartheid in this country, long term prejudices against African-Americans and other minorities cannot be declared "cured" just because we wish that to be the case. The exact opposite must be assumed.

While we are loathe to admit it, many Americans still harbor prejudice against those that they see as "other." that prejudice has an effect on the decisions of federal juries, which are more likely to consist of people who have had vastly different life experiences from those being charged, especially in drug cases.

in light of the execution of Juan Raul Garza, a man of Hispanic heritage, on June nineteenth-the second federal execution in one month-I strongly urge the federal government to call an immediate moratorium on all federal executions. We should not let another person be executed before a review of the uncertainty surrounding the even handedness of the federal death penalty. In addition, as an advocate for the residents of the District of Columbia, I raise the additional concern of the federalization of what, rightfully, should be seen as a local decision against capital punishment. On behalf of my constituents, I thank you for bringing this issue to national attention, and for allowing me the opportunity to make these comments.

Statement of Hon. Strom Thurmond, a U.S. Senator from the State of South Carolina

Mr. Chairman:

The Senate should take its role in the confirmation process very seriously. We must make certain that the men and women who are appointed to the Federal Bench are people of high character, good judgment, and great legal ability.

[1] On November 3, 1992, 66,303 voted in favor of the death penalty, while 135,465 voted against it.

In my view, ideology matters to the extent that it demonstrates that a nominee may be a judicial activist. Judges must understand that they have a limited role in the federal system. Their job is to interpret the laws, not make the laws. They should never impose their personal views of what they think the law should be, regardless of whether those views are conservative or liberal.

Of course, senators have the right to vote against nominees for any reason. However, as I have said in the past, I believe that the President is entitled to some deference in the choices he makes for the federal courts. The standard should not be whether we personally would have chosen the same person, or whether the candidate meets some political litmus test. The real question should be whether the individual is qualified and will exercise judicial restraint.

I believe that President Bush has nominated a fine group of candidates who will serve our nation with distinction. These nominees would fill some of the 107 current judicial vacancies, which is a vacancy rate of 12.5%. A few years ago, some argued that there was a vacancy crisis in the federal courts with numbers lower than these. They constantly blamed Republicans for not acting on President Clinton's nominees. However, when the final numbers were in, it became clear that the Judiciary Committee under Republican leadership was very fair to President Clinton, and I hope the same can be said about President Bush in a few years.

President Clinton had 377 judges confirmed, which is only five less than President Reagan. This is true even though Republicans controlled the Senate during six of President Clinton's eight years, just as we did during six of President Reagan's eight years at a time when I made confirmations a top priority of the Committee. At the end of the Clinton Administration, there was a 7.8% vacancy rate, which is lower than the 11.5% vacancy rate at the end of the earlier Bush Administration or the 12.5% vacancy rate that exists today.

This hearing should help demonstrate that the judicial confirmation process is one of the top responsibilities of this Committee. Yet, this year, we have not scheduled any judicial nominations hearings, except one that then-Chairman Hatch postponed at the request of the Democratic side. It is true that the Senate is still being reorganized, but other Committees, such as Armed Services and Veterans Affairs on which I also serve, have continued to hold nominations hearings while the reorganization is still underway. In fact, this Committee is currently holding legislative and oversight hearings on various topics, including this hearing today and one tomorrow.

I look forward to us having hearings as soon as possible on the many judicial nominees who are pending.

DEPARTMENT OF GOVERNMENT
THE UNIVERSITY OF TEXAS AT AUSTIN
AUSTIN, TEXAS 78712-1087
June 22, 2001

Senator Charles E. Schumer
Committee on the Judiciary
Subcommittee on Administrative Oversight and Courts
524 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Schumer,

Thank you for the opportunity to contribute written testimony to the subcommittee hearing on "Should Ideology Matter? Judicial Nominations, 2001." This is a extraordinarily important topic. I believe that my article, "Constitutional Abdication: The Senate, The President, and Appointments to the Supreme Court" 47 Case Western Reserve Law Review 4 (Summer 1997) may be helpful to your deliberations. I would be delighted to have the article included in the written record of the Hearing.

In the article, I argue that the norm of deference to the President regarding appointments to the Supreme Court is, in fact, a form of constitutional abdication. Deference to the President on appointments to the court is a relatively recent practice. For more than half of our history as a nation, the Senate acted as more robust and responsible coordinate branch of government. In the article, I contrast older constitutional actions of the Senate with modern confirmation cases and attempt to articulate the constitutional bases for a more assertive Senate. In a nutshell, my argument is that the best understandings of separation of powers require the Senate to consider the full array of considerations that are available to the executive, when

Presidents make nominations to the Court. Senators are not merely permitted but, in my view, duty bound to inquire about and assess ideology, constitutional philosophy, political views and any other matter that is arguably relevant to the nominee's suitability for appointment.

Both this letter and my article are submitted in my personal capacity as a scholar in the fields of American political development and constitutional theory. I am affiliated with the University of Texas at Austin as Associate Professor of Government, but I do not represent the University and, to my knowledge, the University takes no position on matters before this committee.

Yours sincerely,

JEFFREY K. TULIS
Associate Professor

UNIVERSITY OF CONNECTICUT
DEPARTMENT OF POLITICAL SCIENCE
COLLEGE OF LIBERAL ARTS AND SCIENCES
June 25, 2001

Subcommittee on Administrative Oversight and the Courts
Committee on the Judiciary
United States Senate
Washington D.C. 20510

Dear Mr. Chairman and members of the subcommittee

Thank you for inviting me to provide a written statement concerning the selection process for United States Supreme Court nominees. For most of the past decade I have been conducting research on the process by which presidents—often with the assistance of other executive branch officials arrive at their respective decisions as to who to nominate to the Supreme Court. In this regard I have paid special attention to the factors that influence the internal vetting process for names, and the creation of administration "short lists" for all high Court vacancies. Although I recognize that other scholars may submit lengthy expositions on such an important subject, in this letter I will err instead on the side of brevity. Certainly I would be happy to elaborate in even greater detail on any aspect of judicial selection if and when thus subcommittee determines that a more comprehensive discussion is warranted.

I understand that your subcommittee is particularly interested in the role that ideology has played in the selection and nomination (pre-confirmation) process. That subject was the focus of my most recent book, Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees (University of Chicago Press, 1999). After reviewing carefully the selection tactics of nine modern presidents over the past half century, I concluded that "ideological considerations" (defined broadly to include political and/or philosophical approaches to the law that might help guide a nominee's vote in future cases) have influenced nearly every modern president's deliberations concerning prospective nominees to the U.S. Supreme Court. To be sure, ideology has not always, been the dominant factor in the selection process; but it has at least shaped (and in some eases outright altered) this decisionmaking process in most instances.

Even casual observers of the Nixon and Reagan Administrations' selection processes might have guessed that those two presidents would emphasize ideological concerns in making their high Court selections. Both Reagan and Nixon openly confessed their frustrations at certain Supreme Court precedents. and each promised that he would name Supreme Court nominees who would adopt a more "conservative" approach to judging. (The Nixon and Reagan administrations' hostility to Miranda and other liberal Warren-Court precedents left little doubt that ideological concerns would come to influence their respective selection processes). Even more striking, however, is the fact that other presidents—including Presidents Truman, Eisenhower, and Ford—all quietly considered the ideology of prospective nominees as well, despite public protestations to the contrary. And President Johnson took private delight at the prospect of erecting impenetrable liberal voting blocs on the Supreme Court. Of the modem presidents then, only John Kennedy appears to have ignored ideological concerns on the whole in the nominee selection process.

Consider even more closely the role that ideology has played in modern presidents' selection processes:

• President Truman is commonly thought to have settled on nominees to the high Court based on friendship and personal loyalty alone. Certainly loyalty was one critical element in Truman's calculus: Chief Justice Fred Vinson and Justice Tom Clark were members of the president's poker-playing inner circle, while Justices Harold Burton and Sherman Minton had been friends with Truman since his early days as a senator from Missouri. But out of Truman's vast array of friends—many of whom were esteemed lawyers—why did these particular men get the nod? In Tom Clark's case at least, the candidate's ideology was a significant factor: not only was Clark an unwavering supporter of Truman's policies, but he had also established himself as a firm believer in the inherent power of the president to act in emergencies.[1] With several controversial administration programs working their way up though the courts; President Truman wanted to appoint a justice committed to a theory of broad executive powers under the Constitution.

• President Dwight Eisenhower publicly complained about the highly political Supreme Court selection processes of his two Democratic predecessors. In fact, the Eisenhower administration's determination to incorporate the ABA into the formal selection process, along with its preference for proven judges with experience on the bench, were both spurred by the president's expressed desire to rid the process of undue ideological and partisan influences. Behind the scenes, however, ideological considerations affected many of President Eisenhower's selections for the high CourtPrivately, Eisenhower criticized liberal Justices like Frank Murphy and Wiley Rutledge. confiding to friends that he wanted to rid the Court of "such left-wingers." Governor Earl Warren's reputation had been carved out of his work as a prosecutor in California and as an advocate of Japanese internment in his home state. Similarly, William Brennan and John Marshall Harlan had once made their names in the legal world as highly respected corporate lawyers. Eventually fnistrated by the liberal voting patterns of Chief Justice Warren and Justice Brennan, Eisenhower beseeched Attorney General William Rogers to be careful with later vacancies to avoid "the disappointment" of those earlier choices. His public comments notwithstanding, President Eisenhower did not just want "professional judges" on the high Court-he wanted (and openly sought) judges who would adhere to his own moderate-to-conservative views on issues that came before the Court.

• Like Tnunan, President Lyndon B. Johnson was accused of using the high Court as a depository for his closest and most trusted friends. Of the three separate individuals Johnson nominated to the high Court during his five years in office, two (Abe Fortas and Homer Thornberry) had been longtime friends of Johnson; the other (Thurgood Marshall) had shown his loyalty to the president by forfeiting a lifetime appointment on the U.S. Court of Appeals to serve as solicitor general diving the Johnson Administration. Yet President Johnson was acutely aware of how his Supreme Court selections might tip the ideological balance of the Court. In 1967 Johnson spoke openly to aides about the possibility of making Judge William Henry Hastic (and not Marshall) the first African-American to sit on the U.S. Supreme Court. But Nicholas Katzenbach and other aides helped convince the president that Hastie's more moderate ideology might pose a problem for his liberal constitueneics.[2] In a telephone conversation with acting Attorney General Corn Clark, President Johnson seemed almost to revel in the possibility that Marshall's nomination might secure the Courfs ultra-liberal voting bloc, remarking: "we'd put Marshall on the Court . . . and my judgment is with Hugo Black, Bill Douglas, the Chief [Earl Warren], Abe Fortas . . . they'll just have a field day."[3]

• During his 1968 presidential campaign, Richard Nixon openly blamed the Warren Court for much of the civil unrest that had afflicted America's cities. Nixon promised that as president, he would appoint only "law and order" judges to the Supreme Court who would "strictly interpret the Con-

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[1] Five months before his Supreme Court nomination, Tom Clark had written a memo to the president in which he had asserted that the president's power to act in emergencies was "exceedingly great," even apart from any specific stanitory authority. Memorandum on "inherent Executive power to Deal With National Emergencies," Justice Department Folder, Baldfdge Papers, Harry S. Truman Library, Independence, Mo.

[2] Nicholas deB Katzenbach, interview by David A—Yalof, June 6, 1996, Princeton, NJ.

[3] Phone conversation between Ramsey Clark and Lyndon Johnson, Tape No. K67.01, January 25, 1967, 8:22 p.m., Lyndon Babies Jobnson Library, Austin, Tex.

stitution and not "make law." And to the extent that partisan politics allowed him any room to maneuver, Nixon proved true to his word. Chief Justice Warren Burger first drew Nixon's attention by virtue of his reputation as an outspoken judge who had criticized Warren Court decisions favoring the accused. Justice Lewis Powell reaped the benefits of his past positions as president of the American Bar Association in the late 1960's: from That high visibility legal perch, Powell had decried the "crisis in law observance" and openly criticized *Mirunda* v. *Arizona*, which he felt unduly limited reasonable law enforcement activities. Even Justice Harry Blackmun, who would later become a steadfast member of the court's liberal wing, initially impressed Nixon as a conservative ideologue, albeit one who was confirmable. While on the U.S. Court of Appeals for the Eighth Circuit, Blackmun had issued a controversial ruling limiting the application of civil rights laws.[4] Blackmun had also sided with prosecutors who brought questionable charges against criminal defendants: and had been the first circuit judge in the nation to uphold the constitutionality of the 1961 federal anti-racketeering law.[5]

• President Gerald Ford persevered in the face of severe political obstacles towards the end of 1975: he was an unelected president with low approval ratings facing a hostile Democratic Senate less than a year before his first presidential election campaign. Ford had originally advocated a less political approach to judicial selection, and he had placed his trust in Edward Levi, who he considered to be the epitome of an "apolitical attorney general." Yet Ford was equally determined to name a candidate with legitimate conservative credentials when a vacancy arose on the Court that November. In fact, a leading candidate for the vacancy would be Solicitor General Robert Bork, who administration officials believed "would provide strong reinforcement to the court's most conservative wing."[6] Ultimately, President Ford tapped U.S. Court of Appeals Judge John Paul Stevens to the high Court in a clear nod to confirmation realities. But ford never lost sight of his desire for a nominee with conservative leanings: at the time, Attorney General Edward Levi had described Stevens as a "moderate conservative"[7] and the president was convinced Stevens provided him with the most viable means of naming a conservative to the Supreme Court before the upcoming 1976 election.

• President Reagan's high Court selection process emphasized ideology to an unprecedented degree among modern presidents. In a 1985 memorandum identifying attributes of "the ideal Supreme Court candidate," one high-ranking administration official identified numerous ideological criteria including (1) the refusal to create new constitutional rights for the individual; (2) deference to state in their spheres; (3) appropriate deference to agencies, (4) a disposition towards 'less government rather than more'; and (5) appreciation for the role of free market in our society. Reagan's aides then scoured the judicial landscape for individuals whose ideological approaches to judging matched as many of these criteria as possible. Viewed from this perspective, U.S. Court of Appeals Judges Antonin Scalia and Robert Bork enjoyed unparalleled records as ideologically conservative jurists, and each received a nomination to the Court during Reagan's second term in office. Although a fallback candidate in late 1987, Judge Anthony Kennedy had been listed along with five other judges as exhibiting all the necessary conservative qualities. Before being nominated to the Court in 1981, Sandra Day O'Connor as well was forced. to answer probing questions about her views on abortion and other hot button issues.

Numerous lessons can be learned from a comprehensive study of modern presidents' selection processes for Supreme Court nominees. Certainly, presidential statements, about the selection processes cannot always be taken at face value: even those presidents that publicly disclaimed the role of ideology in their respective selection processes remained cognizant of important issues that might come before the court, and of the impact various candidates might have on the Court's overall ideological balance. Additionally, it is not enough to simply writc off various candidacies as simply "responses to the realities of confirmation politics." At any given time

[4] Sec *Jones* v. *Alfred Mayer*. 379 F.2d 33 (8th Cir. 1965)

[5] *Bass* v. *United States*, 324 F.2d 168 (8th Cir. 1963)

[6] Memo, Edward H—Levi to Gerald R. Ford, November 10, 1975, Supreme Court Nominations-Letters to the President, 10 November 1975–12 November 1975 file, Richard Cheney files, Gerald R. Ford Library, Ann Arbor, Michigan.

[7] Id.

there exists a pool of literally dozens of candidates capable of fulfilling any of numeious criteria for the Court, political or otherwise. Discerning why the president chose "that particular friend" or "that particular confirmable candidate" for a Supreme Court vacancy requires that we analyze other critical factors that may simultaneously infltrate the decisiomnaking process. And in most instances since World War II, ideology has played an especially significant role in thus process.

The papers from George H. W. Bush's presidency are only beginning to be made available to scholars, and papers from the Clinton presidency will not be available even in limited form until 2006 at the earliest. Consequently, it is difcult to discover at this point with any reasonable certainty what drove those two recent presidents to choose the Supreme Court nominees they did. Still, secondary sources and early interview data confirm the presence of the same historical tend described above: ideological considerations continue to play a significant role in the selection process for modem presidents.

Thank you again for allowing me to submit this statement to your subcommittee. If you desire any further elaboration or detail on these or any other aspects of recent selection practices, I would be more than happy to provide you with such information.

Sincerely,

DAVID ALISTAIR YALOF

Statement of Ernest A. Young, Assistant Professor of Law, University of Texas at Austin

My name is Ernest A. Young. I am presently an Assistant Professor of Law at the University of Texas at Austin. Prior to that, I graduated from Dartmouth College and Harvard Law School and served as a law clerk to the Honorable Michael Boudin of the United States Court of Appeals for the First Circuit and the Honorable David Souter of the United States Supreme Court. I have also practiced law in Dallas, TX and Washington, D.C., and taught at Georgetown University Law Center and Villanova University School of Law. At Texas, I teach courses on Constitutional Law and Federal Courts. I have written extensively on constitutional and statutory interpretation,[1] federalism,[2] federal jurisdiction,[3] and conservative jurisprudence.[4] I recently participated in a panel discussion at the University of Chicago Law School on "conservative judicial activism," and I have been invited to take part in a symposium on the same topic at the University of Colorado in October of this year.

I am grateful to the Subcommittee for the opportunity to place in the record a few comments on the phenomenon of "conservative judicial activism" as it relates to the judicial appointments and confirmation process. It is very much in vogue these days to accuse the current Supreme Court of "conservative judicial activism," [5] and it is not surprising that these debates about the current Court's role should spill over into discussions about what sort of people should join the ranks of the federal judiciary. The problem is that neither "conservative" nor "judicial activism" are terms that are easy to define. I want to spend the bulk of my space here exploring the different things that we might mean by "judicial activism," in hopes of helping

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[1] See, e.g., Adrian Vermeule & Ernest A. Young, Hercules, Herbert, and Amar:: The Trouble with Intratextualism, 113 HARV. L. REV. 730 (2000); Ernest A. Young, Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review, 78 TEX. L. REV. 1549 (2000).

[2] See, e.g., Lynn A. Baker & Ernest A. Young, Federalism and the Double Standard of Judicial Review,—DUKE L. J.—(forthcoming Oct. 2001); Ernest A. Young, Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception, 69 GEO. WASH. L. REV. 1701 (2001); Ernest A. Young, State Sovereign Immunity and the Future ofFederalism, 1999 SUP. CT. REV. 1.

[3] See, e.g., Mitchell N. Berman, R. Anthony Reese, & Ernest A. Young, State Accountability for Violations of Intellectual Property Rights: How to "Fix" Florida Prepaid (And How Not To), 79 TEX. L. REV. 1037 (2001); Ernest A. Young, Preemption at Sea, 67 GEO. WASH. L. REV. 273 (1999).

[4] See, e.g., *Ernest A. Young, Alden* v. *Maine* and the Jurisprudence of Structure, 41 WM. & MARY L. REV. 1601 (2000); Ernest A. Young, Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation, 72 N.C. L. REV. 619 (1994).

[5] See, e.g., Peter M. Shane, Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism, 45 VILL. L. REV. 201 (2000). This sort of criticism has been going on for over half a decade. See, e.g., Linda Greenhouse, Farewell to the Old Order in the Court: The Right Goes Activist and the Center is a void, N.Y. TIMES, July 2, 1995, § 4 (Week in Review), at 1.

the participants in this debate avoid talking past one another. My conclusion is that we are unlikely to come up with a consensus definition of what judicial behavior is "activist" and what is not. Most of the time, participants in both academic and political debates use "judicial activism" as a convenient shorthand for judicial decisions they don't like. For that reason, the term may not be that useful in discussions about what sort of judges we want.

That conclusion has two implications, I think, for the Senate's role in helping to decide who shall sit on the federal bench. First, the Senate should take charges that the federal courts are currently in a uniquely "activist" phase—and that this "new" development warrants a particularly searching review of Republican nominees for the bench—with a grain of salt. The activism of the decisions coming from the federal courts these days is largely in the eye of the beholder; moreover, those decisions actually point in a variety of political directions.

Second, if we cannot distinguish criticisms of "judicial activism" from disagreements on the merits of particular cases, there is probably no way to avoid exploring the substance of particular legal issues in confirmation hearings. Because "activism" and "restraint" come in so many guises, particular nominees should not be rejected out of hand simply because their beliefs or prior positions may fit one or more definitions of "activism" on particular issues. The same position, after all, may plausibly indicate "restraint" when viewed from another angle. The important question is whether the nominee's views make sense on the merits.

I. WHAT IS "JUDICIAL ACTIVISM"?

Debates about the law frequently involve charges of "judicial activism," but those charges are rarely accompanied by any attempt to define the term with any sort of precision. There's a reason for that: It's awfully hard to do. I want to start with three different definitions of "judicial activism," each of which has some intuitive appeal:

- striking down laws
- refusing to adhere to precedent
- straying from the text and original intent of the Constitution

The first of these—a court's willingness to strike down laws on constitutional grounds—is frequently used as a measure of "activism," probably because it is the easiest to measure empirically. And yet it is not hard to come up with examples where this definition makes little sense. Consider last year's decision in *Dickerson* v. *United States*.[6] Dickerson involved the constitutionality of 18 U.S.C. § 3501, a federal statute enacted in the wake of the Miranda decision that required federal courts to admit confessions into evidence if they were "voluntary," based on the sort of totality-of-the-circumstances inquiry that Miranda had eschewed. The statute had lain defunct for 30 years, ignored by the Justice Department due to doubts about its constitutionality, until the Fourth Circuit invoked it on their own motion and forced the issue. The Supreme Court held the statute unconstitutional in Dickerson, and yet there were no cries of judicial activism; indeed, one suspects that the Court would have been accused of being activist if it had not struck the statute, for refusing to adhere to its 34-year-old precedent in Miranda. The fact that Miranda itself was considered an activist decision only heightens the confusion.

In other situations this measure is simply unhelpful. In this term's Good News Club decision,[7] for example, the Court struck down a New York public school's policy of excluding religious groups from using school buildings after hours, despite the fact that secular groups were allowed to do so. The School's justification for the policy, however, was that it was necessary to prevent an Establishment Clause violation. So which result is activist: Striking down the policy, as the Court did, on free speech grounds, or upholding the policy on the ground that failing to have such a policy would itself be unconstitutional under the Establishment Clause?[8] Each possible holding would involve declaring that a particular public policy (either inclusion or exclusion of believers) is unconstitutional.

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[6] 530 U.S. 428 (2000).

[7] *Good News Club* v. *Milford Central School*, No. 99–2036 (June 11, 2001).

[8] The same situation was presented in *Rosenberger* v. *Rector* and Visitors of Univ. of Va., 515 U.S. 819 (1995). In both cases, the Court could have avoided both alternatives by refusing to find that the school policy discriminated against religious viewpoints—thereby avoiding the need to find an Establishment Clause interest to support the policy. But to my mind, the argument that there was no viewpoint discrimination in the cases was far less plausible than the claim that the alternative to the school's policy—allowing religious worship on school property—presented an Establishment Clause problem.

For a more familiar example, consider a decision by the current Court to overrule *Roe* v. *Wade*[9] and *Planned Parenthood* v. *Casey*.[10] Surely such a decision would be criticized by supporters of those decisions as activist; in fact, fear of such criticism seems to have been a powerful part of the Court's stare decisis analysis in Casey. But it was Roe and Casey that struck down legislative acts; a decision overruling those decisions would amount to a refusal to invalidate legislative restrictions on the right to an abortion. This example points toward the second intuitive definition of judicial activism—a refusal to follow settled precedent—and demonstrates how it may conflict with the first definition. Dickerson is another example of such conflict; the Court's adherence to the settled Miranda precedent required it to invalidate an Act of Congress.[11] On the other side of the coin, several members of the current Court have refused to adhere to the Court's recent precedents on state sovereign immunity, precisely because the dissenters viewed those precedents as activist decisions.[12] In all these areas, then, both sides can be plausibly charged with "judicial activism," depending on which definition one uses.

What about the third definition: refusal to adhere to the text and original understanding of the Constitution? This is also a frequently used indicator of "activism," and yet it may radically conflict with the other two that I have discussed. For example, Justice Thomas has recently argued that the Constitution's text and the original understanding of its structure would require both a dramatically narrower reading of the federal Commerce power than current doctrine provides for,[13] as well as substantially stricter limits on Congress's ability to delegate authority to federal administrative agencies.[14] It is difficult to dispute the Justice's history, yet I think it is fair to say that most academic observers would see adoption of Justice Thomas's views as judicial activism of the most radical kind.[15] The reason is that limiting the Commerce Clause to regulation of buying and selling (as opposed to manufacturing, agriculture, and all other forms of economic activity) or outlawing the delegation of legislative power would not only require overruling at least 70 years of judicial precedent, but would also throw open to constitutional question a substantial portion of the U.S. Code. Once again, then, each side of this debate can plausibly call the other "activist." Justice Thomas may charge his critics with ignoring the text and history of the Constitution; the critics can point to the disruptive consequences of a return to the original understanding.

I want to consider one final kind of "activism" that has more to do with the way the courts decide cases than with the substance of the decisions they reach. The idea is well captured by Professor Cass Sunstein's distinction between judicial "minimalism" and "maximalism."[16] A minimalist judge decides cases narrowly, leaving as much as possible undecided for consideration in the next case. A maximalist judge, on the other hand, announces sweeping rules in each case, reaching out to decide issues that could have been avoided or put off for another day.[17] *McCulloc*h v. *Maryland*[18] and *Roe* v. *Wade* were maximalist decisions, announcing sweeping principles all at once; the Court's decision five years ago in *Denver Area Telecommunications Consortium* v. *FCC*,[19] in which the Court refused to state categorical rules to govern public- and leased-access cable channels, preferring to proceed

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[9] 410 U.S. 113 (1973) (striking down Texas law prohibiting abortion).

[10] 505 U.S. 833 (1992) (refusing to overrule *Roe*).

[11] See also *Texas* v. *Johnson*, 491 U.S. 397 (adhering to settled First Amendment precedent and striking down Texas's flag desecration statute). Once Johnson itself was on the books, that precedent in turn required the Court to invalidate a federal flag—burning statute in *United States* v. *Eichman*, 496 U.S. 310 (1990).

[12] See *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 98 (2000) (Stevens, J., dissenting) ("The kind of judicial activism manifested in cases like Seminole Tribe represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.").

[13] *United States* v. *Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

[14] *Whitman* v. *American Trucking Assn's*, 121 S. Ct. 903, 919 (2001) (Thomas, J., concurring).

[15] In fairness, Justice Thomas himself has recognized the radical reshaping of present doctrine that adoption of his views might require, and for that reason has suggested only that the Court should consider the issue in a proper case.

[16] See Cass R. Sunstein, Foreword: Leaving Things Undecided, 110 HARV. L. REV. 6 (1996); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

[17] I am speaking here primarily of a judge's approach to defining the content of constitutional rights and limitations. Similar issues of "activism" arise on the remedial side, when the judge has to devise ways to enforce the Constitution as he has interpreted it.

[18] 17 U.S. (4 Wheat.) 316 (1819).

[19] 518 U.S. 727 (1996).

on a case-by-case basis in the face of a rapidly evolving technological and regulatory environment, is a good example of minimalism.

When we call the Court "activist" because it "reached out" to decide an issue not strictly before it, or announced a principle broader than the case required, or tried to definitively settle an issue before society was ready for it to be settled, we are complaining about judicial maximalism. But maximalism has its own problems as a definition of judicial activism. For example, as Professor Sunstein points out, both *United States* v. *Lopez*,[20] invalidating the federal Gun Free School Zones Act on Commerce Clause grounds, and *Romer* v. *Evans*,[21] striking down Colorado's anti-gay amendment to its state constitution, were extremely narrow decisions. Nonetheless, both decisions are frequently cited as instances of judicial activism on the grounds that they invalidated legislative acts, departed from precedent, or contravened the Constitution's text and history.[22] (These two decisions illustrate, moreover, that the current Court's "activism" may point in both politically "conservative" and "liberal" directions.[23])

In the end, it's hard to escape the conclusion that "judicial activism" is a lot like Justice Stewart's famous definition of obscenity: We know it when we see it.[24] There was, of course, an element of truth to Justice Stewart's observation; it's notoriously hard to define obscenity in any precise way, and yet most of us would agree that, practically speaking, we can identify many or even most instances of obscenity when we encounter them. The same is true here: The term "judicial activism" captures the important truth that there is a point at which judging shades over into politics, and it's probably easier to agree on examples than on definitions.

The problem is that, because the definitions of judicial activism are so manipulable, it's easy to cry "activism" whenever one simply disagrees with how a court has interpreted and applied the law. My own view is that "activism" has become an epithet with very little substantive comment, and it is thrown about as a shorthand way of criticizing decisions with which one disagrees on the merits. As Justice Ginsburg observed at her own confirmation hearings, judicial activism is "a label too often pressed into service by critics of court results rather than the legitimacy of court decisions."[25] This is not to deny that the disagreements underlying a claim of "activism" may be quite important; the point is simply that the reference to "activism" itself adds little of substance to that disagreement. Better, I think, to cut straight to the issues of substantive disagreement. Court decisions should be evaluated on their merits, and discussions of whether they are activist or not seem likely to be relatively unhelpful in that discussion.

II. The Role of the Senate

I am not a scholar of the judicial confirmation process, and others can no doubt provide more informed guidance on, for example, the original understanding of the Senate's role. The observations I have just made, however, do suggest two points concerning that role:

First, arguments by scholars on the Left that the Rehnquist Court's "conservative judicial activism" somehow justifies a uniquely non-deferential role for the Senate

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[20] 514 U.S. 549 (1995).

[21] 517 U.S. 620 (1996).

[22] See, e.g., Donald H. Zeigler, The New Activist Court, 45 Am. U. L. REV. 1367, 1389 (1996) ("*United States* v. *Lopez* is another striking example of judicial activism."); Louis Michael Seidman, Romer's Radicalism: The Unexpected Revival of Warren Court Activism, 1996 SUP. CT. REv. 67 (arguing that the Romer opinion "recaptures the moral drama and ambiguity of Warren Court activism years after the culture had seemingly discarded it").

[23] Other examples of politically "liberal" decisions invalidating public policies on constitutional grounds by the current Court are not hard to find. See, e.g., *Legal Services Corp*. v. *Velazquez*, 531 U.S. 533 (2001) (striking down federal limitations on ability of Legal Services program grantees to challenge welfare reform policies); *Stenberg* v. *Carhart*, 530 U.S. 914 (2000) (invalidating state ban on partial birth abortions); *United States* v. *Playboy Entertainment Group*, 529 U.S. 803 (2000) (striking down federal statute requiring scrambling of sexualy-explicit programming); *Saenz* v. *Roe*, 526 U.S. 489 (1999) (striking down California durational residence requirement for public benefits under the Privileges and Immunities Clause); *Reno* v. *ACLU*, 521 U.S. 844 (1997) (striking down the federal Communications Decency Act limiting children's access to indecent material on the internet); *United States* v. *Virginia*, 518 U.S. 515 (1996) (striking down single-sex policy at Virginia Military Institute). One could go on and on with this list.

[24] See *Jacobellis* v. *Ohio*, 378 U.S. 184, 197 (1954) (Stewart, J., concurring). That definition, of course, is itself frequently cited as an instance of judicial activism in the sense of a judge reading his own values into the Constitution.

[25] Quoted in Ziegler, supra note 22, at 1367–68.

in the confirmation process seem misplaced.[26] It is impossible to say that the present Court is uniquely "activist" without some agreed definition of what that term means, and agreement on that issue is hard to come by. Moreover, the Court has decided any number of cases which meet one or more definitions of judicial activism but which point in politically "liberal" directions—last term's invalidation of a state ban on partial-birth abortions and 1997's rejection of the federal Communications Decency Act being only two of the most prominent examples.[27]

Second, there is likely to be no escape from a substantive inquiry into a nominee's views on particular legal issues. It is tempting, of course, to try to compromise between offering the President a blank check, on the one hand, and contentious hearings on particularly divisive issues, on the other, by avoiding legal substance and simply trying to weed out the "activists." No definition of "activism," unfortunately, is sufficiently persuasive to bear the weight of such an inquiry. It is better to forthrightly discuss the merits of legal issues than to mask such debates by unilluminating charges and countercharges of "activism."

This is not to say that there is no such thing as "judicial activism"—in other words, that the so-called problem of activism is not something that we need to worry about. Of course it is. There are crucial differences between judging and political decisionmaking, and when judges forget that fact they may usurp powers more properly left to the People's elected representatives. The problem, rather, is that such usurpation may take any of the forms I have discussed striking down laws, overruling precedent, departing from text and history, deciding cases too broadly-and that on the other hand many decisions that take these sorts of actions are not "activist" in any way worthy of criticism. It is very difficult to identify instances of judicial misbehavior without first evaluating whether a given decision was right or wrong on the merits; only then can one ask whether it was so wrong that the decision overstepped the bounds of the judicial role. That is why it seems best to focus on the merits of legal issues rather than treating "activism" as a separate issue.

I also do not mean to suggest that, in considering the substantive views of nominees, the Senate should not be prepared to give some degree of deference to the President's choices. The need for such deference stems from the practical necessities imposed by divided government: The system needs judges, and it will not get them if the participants in the confirmation process cannot find some common ground through compromise and mutual forbearance. In the end, the most important task facing the Senate may be that of finding a way to de-escalate from the highly politicized judicial confirmation process that we have seen in the past decade and a half.

Regardless of the degree of leeway that the Senate is prepared to give the President, however, Senators must still have some criterion for evaluating individual nominees. On that issue, I have argued that the important question is whether the nominee's views make sense on the merits—not whether those views are "activist" or "restrained." The former issue, of course, may itself be a highly contentious one. But at least it is the right question, and that is a start.

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[26] See, e.g., Cass R. Sunstein, Tilting the Scales Rightward, The NEW YORK TIMES, April 26, 2001, at A23.

[27] See *Stenberg* v. *Carhart*, 530 U.S. 914 (2000); *Reno* v. *ACLU*, 521 U.S. 844 (1997), as well as the cases cited in note 23, supra. Even in the area of criminal procedure—a hallmark of Warren Court activism—the Rehnquist Court has hardly led a monolithic assault on the rights of criminal defendants. See, e.g., *Kyllo* v. *United States*, No. 998508, 2001 U.S. LEXIS 4487 (June 11, 2001) (holding that police use of thermal imaging technology to detect criminal activities inside a home without entering it amounted to a "search" under the Fourth Amendment); *Penry* v. *Johnson*, No. 00–6677, 2001 U.S. LEXIS 4309 (June 4, 2001) (overturning death sentence because jury was improperly instructed on mitigating factor of mental retardation); *Williams* v. *Taylor*, 529 U.S. 362 (2000) (upholding habeas corpus petitioner's Sixth Amendment claim of ineffective assistance of counsel).